91-1370

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MABEL A. KING,

Petitioner,

v.

JAMES F. PALMER, DIRECTOR,
D.C. DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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February 21, 1992

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QUESTION PRESENTED

Whether, in determining the amount of a reasonable attorney's fee under a federal fee-shifting statute, a court may increase the fee award above the lodestar amount in order to reflect the fact that the attorney took the case on a contingent fee basis.

PARTIES TO THE PROCEEDING BELOW

The following parties appeared below:

Plaintiff: Mabel A. King

Defendants: James F. Palmer, Director
D.C. Department of Corrections
The District of Columbia

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mabel A. King respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on December 13, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit *en banc* is reported at 950 F.2d 771 (D.C. Cir. 1991), and is reproduced in the Appendix ("App.") at App. 1a-50a. The panel opinion of the Court of Appeals is reported at 906 F.2d 762 (D.C. Cir. 1990), and is reproduced at App. 51a. The unreported memorandum opinions of the United States District Court for the District of Columbia are reproduced at App. 72a, 77a, and 96a.

JURISDICTION

The judgment of the Court of Appeals *en banc* was entered on December 13, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, provides in its pertinent section that:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k) (1988). Section 2000e-16(d) extends the provisions of section 2000e-5(k) to actions by employees of the District of Columbia. These statutory provisions are referred to below as "Title VII."

STATEMENT OF THE CASE

The question presented in this case is essentially the same as in another case now before this Court on the merits:

> May a court, in determining a reasonable attorney's fee award under [two environmental protection statutes], enhance the fee award above the lodestar amount in order to reflect the fact that the attorneys had taken the case on a contingent-fee basis, thus assuming the risk of receiving no attorney's fees at all?

City of Burlington v. Dague, No. 91-810, *cert. granted* (U.S. Jan. 27, 1992) ("*Dague*"). In this case, the operative fee-shifting statute is Title VII, which employs the same statutory standard of "a reasonable attorney's fee."

The D.C. Circuit concluded in this case, as did the Second Circuit in *Dague*, that this Court's 4-1-4 decision in *Pennsylvania v. Delaware Valley Citizens' Council for*

Clean Air, 483 U.S. 711 (1987) ("*Delaware Valley II*"), provides no legal rule for the risk enhancement of attorney's fees awards in cases taken on a contingent fee basis. App. 22a-25a; *Dague v. City of Burlington*, 935 F.2d 1343, 1360 (2d Cir. 1991). Believing itself free to decide the issue on its own, the D.C. Circuit ruled that contingency enhancement is never appropriate, App. 26a, making itself the only court of appeals to so hold since this Court's decision in *Delaware Valley II*. The decision below creates a clear split among the circuits, one that did not exist after the Second Circuit's decision in *Dague*.

The extensive record in this case presents the contingency enhancement issue in a far more developed factual context than in *Dague*. Risk enhancement was vigorously litigated as a central issue below, based on dozens of affidavits,[1] and was thoroughly examined in opinions of the district court, the court of appeals panel, and the court of appeals *en banc*. The record includes detailed evidence of many attorneys' billing practices in contingency cases, in a wide variety of legal practice fields in the District of Columbia. Particularly in view of the difficulty experienced in the past by this Court and the lower federal courts in developing and applying manageable rules for contingency enhancement of attorney's fees awards, the next—and hopefully definitive—step should be taken only based on the fullest available factual record. Petitioner respectfully requests that review be granted and that this case be consolidated with *Dague* for further briefing and consideration.

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[1] The relevant affidavits from the record below were all compiled into a single volume in the Joint Appendix submitted to the D.C. Circuit. Copies of that appendix have been lodged with the Court, and the affidavits will be cited as "Rec." with the page number(s) shown therein.

A. The Legal Framework Under Which The Issue Was Litigated

There were three opinions in *Delaware Valley II*: one by Justice White, joined by three other justices; one by Justice O'Connor, concurring in part and concurring in the judgment; and a dissenting opinion by Justice Blackmun, joined by three other justices. The plurality opinion expressed skepticism regarding risk enhancement, stating that it should be available if at all, only in "exceptional cases," and then in an amount no greater than one-third of the lodestar amount. 483 U.S. at 728-30 (White, J., joined by Rehnquist, C.J., Powell, J., and Scalia, J.). Justice O'Connor declined to join the plurality's "exceptional cases" standard, but concurred in the judgment on grounds discussed in detail below. *Id.* at 731-35 (O'Connor, J., concurring in part and concurring in the judgment). Justice Blackmun's dissent articulated other circumstances, broader than those stated by Justice O'Connor, under which risk enhancement should be available. *Id.* at 735-55 (Blackmun, J., dissenting, joined by Brennan, J., Marshall, J., and Stevens, J.).

In this case, the D.C. Circuit concluded *en banc* that the 4-1-4 *Delaware Valley II* decision did not establish any legal rule for the contingency enhancement of attorney's fees awards. App. 25a. In at least three previous opinions, the concurring opinion of Justice O'Connor had been held by the D.C. Circuit to state the controlling law on the enhancement of fee awards for the risk of non-payment.[2] Because this case was litigated in the trial court on the basis of the then-prevailing interpretation of Justice O'Connor's opinion as controlling, that opinion

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[2] *See, McKenzie v. Kennickell*, 875 F.2d 330, 332 (D.C. Cir.), *reh'g denied en banc*, 884 F.2d 1405 (D.C. Cir. 1989); *Weisberg v. U.S. Dep't of Justice*, 848 F.2d 1265, 1272 (D.C. Cir. 1988); *Thompson v. Kennickell*, 836 F.2d 616, 621 (D.C. Cir. 1988); *see also* cases cited *infra* at 20 and n.20 (treating Justice O'Connor's concurrence as controlling).

serves as a vital backdrop to the factual development of this case.

Justice O'Connor prescribed a two-part standard for enhancement. First, the availability of risk enhancement depends upon "how a particular market compensates for contingency" across a class of cases. 483 U.S. at 733. Second, "no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Id.* (citation omitted). If these two tests are met, then enhancement shall be granted in an amount sufficient "to bring the fee within the range that would attract competent counsel." *Id.* Justice O'Connor also stated that the lower courts should "treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market," and "strive for consistency from one fee determination to the next." *Id.*

Before this case, Justice O'Connor's two-pronged approach in *Delaware Valley II* had been applied in a series of cases in the D.C. Circuit. Thus, in the last three years, a number of district court judges for the District of Columbia have had occasion to evaluate the local market for legal services.[3] In these cases, there has been a substantial and growing body of evidence consisting of affidavits from local private practitioners, representatives of legal services organizations, and others with knowledge of the market for legal services.[4] The United States Dis-

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[3] In addition to the case at bar, the other cases are: *Broderick v. Ruder*, Civ. A. No. 86-1834, slip op. (D.D.C. Sept. 13, 1989) (Pratt, J.); *Weisberg v. U.S. Dep't of Justice*, 720 F. Supp. 1 (D.D.C. 1989) (Green, J.L., J.); *Thompson v. Kennickell*, 710 F. Supp. 1 (D.D.C. 1989) (Richey, J.); *McKenzie v. Kennickell*, 684 F. Supp. 1097 (D.D.C. 1988) (Parker, J.), *aff'd*, 875 F.2d 330 (D.C. Cir.), *reh'g denied en banc*, 884 F.2d 1405 (D.C. Cir. 1989); *Palmer v. Shultz*, 679 F. Supp. 68 (D.D.C. 1988) (Smith, J.).

[4] *See, e.g., Broderick*, slip op. at 3 n.1; *Thompson*, 710 F. Supp. at 5 n.9; *McKenzie*, 684 F. Supp. at 1100 n.11.

trict Court for the District of Columbia has consistently concluded that the prevailing threshold for acceptance of contingent cases was and is risk enhancement of 100 percent or more.[5]

B. The Underlying Gender Discrimination Case

This case was originally brought in 1983 by Mabel King as an individual action pursuant to Title VII of the Civil Rights Act. An employee of the District of Columbia Department of Corrections, Mrs. King sought relief from discriminatory employment practices based upon sex.[6] After a bench trial, the district court entered judgment for the District.

Mrs. King appealed. The Court of Appeals reversed and remanded in December 1985, with instructions for the district court to enter judgment for Mrs. King and to determine an appropriate remedy. *King v. Palmer*, 778 F.2d 878 (D.C. Cir. 1985). On remand, the district court awarded Mrs. King a retroactive promotion and back pay. App. 120a-128a.

C. Background of Representation by Counsel

Throughout the underlying Title VII litigation, Mrs. King was represented by Robert M. Adler, a sole practitioner. Mrs. King was aware of Mr. Adler through a

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[5] *Broderick*, slip op. (100% enhancement); *Weisberg*, 720 F. Supp. 1 (100% enhancement found warranted by market, 50% granted); *Thompson*, 710 F. Supp. 1 (100%); *McKenzie*, 684 F. Supp. at 1101 (50% enhancement granted because only 50% requested, but finding the relevant market to require 100% enhancement or more); *Palmer*, 679 F. Supp. 68 (100% enhancement of fees at risk). In the case at bar, the district court found appropriate a rule of 100 percent enhancement for contingent cases, and 50 percent enhancement for partially contingent cases. *See infra* at 13-14.

[6] Defendants James F. Palmer, the District of Columbia Department of Corrections, *et al.*, will be referred to collectively as the "District."

colleague who had earlier retained his services. App. 4a. Mr. Adler was assisted at times by an associate and a law clerk or paralegal.

The fee arrangement between Mrs. King and Mr. Adler was memorialized in a retainer letter. Mrs. King agreed to be responsible for all out-of-pocket expenses, and for hourly fees up to $5,000, with an immediate retainer of $1,500; in addition, should Mrs. King prevail, Mr. Adler would be paid whatever fees might in the future be awarded under the fee-shifting provisions of Title VII. App. 4a-5a, 129a-30a. Thus, Mr. Adler shouldered a substantial risk that he would never be paid for most of his work in the case. App. 87a.

When Mr. Adler took the case, he was aware of and relied on the possibility that if Mrs. King prevailed in her case, the district court might award a reasonable enhancement for the risk of non-payment undertaken by counsel. Rec. 74 (Decl. of Robert Adler). Because of the significant risk of non-payment, Mr. Adler would not have accepted the representation without the prospect of risk enhancement of a fee award. Rec. 75 (Decl. of Robert Adler).

D. The Local Market For Legal Services

During the attorney's fees phase of this litigation before the district court, an extensive record was developed concerning the Washington, D.C., market for legal services. The District was unable to identify a single attorney who would have accepted this case without the prospect of risk enhancement. The record establishes that District of Columbia lawyers would take cases like Mrs. King's only if they were to be paid win or lose—or if the fee were to be contingent on winning, only with the prospect of risk enhancement of at least 100 percent of their normal hourly rates.

1. *The Availability of Other Counsel*

The record shows that since the early 1980's, many Title VII lawyers in the District of Columbia who once took contingent fee cases have stopped doing so, as a direct result of the economic disadvantages they experienced in this practice.[7] When the District responded by attempting to show that a number of Title VII cases continued to be brought with the assistance of counsel, plaintiff rebutted this with affidavits that these cases had been taken on a straight hourly basis and not on a contingency basis.[8]

Around 1983, there were a few lawyers competent in Title VII practice who would occasionally take cases on a contingent fee basis, but only with the expectation of risk enhancement in the event of success. More specifically, as the record reflects, experienced local Title VII lawyers would not have taken Mrs. King's case in 1983 on a contingent fee basis absent the reasonable prospect of risk enhancement. For instance, six private practitioners stated that:

> *George Chuzi.* Mr. Chuzi is a partner in a small Washington, D.C., firm which since 1975 has primarily represented plaintiffs in employment-related litigation. He would have personally declined to accept this particular case in 1983 on a contingent fee basis, even if Mrs. King had agreed to pay up to

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[7] This holds not only for veterans of Title VII practice, *e.g.*, Rec. 92 (Decl. of Joel Bennett: stopped in 1981); Rec. 265-66 (Decl. of Gary Simpson); Rec. 274 (Decl. of Larry Speiser); Rec. 296 (Decl. of Robert Weinberg), but also for relative newcomers to the field, *e.g.*, Rec. 272 (Decl. of Lisa Sinrod); Rec. 184 (Decl. of Richard Hirn).

[8] Rec. 84 (Decl. of Alan Banov); Rec. 107 (Decl. of William Bransford); Rec. 109 (Decl. of Gary Brown); Rec. 113 (Decl. of William Causey); Rec. 173 (Decl. of Louis Fireison); Rec. 182 (Decl. of Clarence Harper); Rec. 220 (Decl. of Thomas Mauro); Rec. 231 (Decl. of Lynn Miller); Rec. 236 (Decl. of Courts Oulahan); Rec. 238-39 (Decl. of Edward Passman).

$5,000 in fees. He also stated that "[d]uring 1983, I was personally familiar with most of the attorneys regularly bringing Title VII suits in the District of Columbia on behalf of plaintiffs. Had Mr. Adler not agreed to represent Mrs. King in this case, I am unaware of any other Title VII attorney who would have agreed in 1983 to represent her on a contingency fee basis (even had she agreed to pay up to $5,000 in legal fees). The only way in which I believe that a competent Title VII attorney would have been convinced to seriously consider this representation was if there was a reasonable possibility of receiving an enhanced fee for risk (over and above hourly rates) if Mrs. King prevailed." Rec. 124b, 130-31.

David Cashden. Mr. Cashden has over 20 years' experience in civil rights litigation and has been actively involved in employment discrimination matters. With respect to Mrs. King's case in 1983, he stated that it was "not likely that I would have accepted the case on a contingent basis." Rec. 112d.

Robert Fitzpatrick. Mr. Fitzpatrick is a partner in a local firm, and over the years he and his firm have undertaken a number of large Title VII cases, some on a fee-shifting basis where the firm's fees were fully contingent. However, his firm would not have accepted Mrs. King's case in 1983 on a contingent fee basis. Rec. 173b-173c.

Lawrence Lapidus. Mr. Lapidus was actively involved in the representation of aggrieved federal employees from 1974 until 1986. Neither he nor his firm would have taken Mrs. King's case in 1983 without some reasonable possibility of risk enhancement. In addition, he was familiar with the Title VII plaintiffs bar during 1983 and viewed the possibility that some other firm would have taken the case on a *pro bono* basis as "remote." He thought it doubtful that any competent local Title VII lawyer other than Mr. Adler would have taken the case. Rec. 209-10, 214-15.

Barry Gottfried. Mr. Gottfried has been actively involved in Title VII cases since 1979. He would not have accepted Mrs. King's case in 1983, absent a reasonable prospect of a fee enhancement for the risk of nonpayment. Rec. 177-78.

Joel Bennett. Mr. Bennett is a sole practitioner with a local practice primarily devoted to plaintiffs' employment litigation. Until 1981, he accepted cases on a contingent basis, but stopped doing so at that time, adding that a "contingency enhancement of 100% above my hourly rate would be necessary before I would consider accepting a contingent case even from an individual plaintiff." He also stated that "the vast majority of the attorneys in the Washington metropolitan area doing Title VII work will not do so on a contingency fee arrangement" and that prospective Title VII plaintiffs often speak to him of having had difficulties obtaining counsel on a contingency basis. Rec. 92-93, 94, 98.

The record below consists of similar uncontradicted evidence of the unavailability of lawyers to take Mrs. King's case without the prospect of risk enhancement. In addition, the record includes the affidavits of a dozen local Title VII plaintiffs, each of whom sought but could not retain counsel on a contingency basis, and who then proceeded *pro se*.[9]

Representatives of public interest legal organizations and referral services also confirmed the general unavailability of counsel for this case. For instance, the Director of the Equal Employment Program of the Washington Lawyers' Committee for Civil Rights Under Law ex-

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[9] Rec. 90 (turned down by 5 lawyers); Rec. 111 ("a few" turndowns); Rec. 123 (unable to locate attorney through D.C. Bar Association); Rec. 142 (4 turndowns); Rec. 150 (a "few" turndowns); Rec. 152 (unable to locate attorney through D.C. Bar Association); Rec. 174 (6 turndowns); Rec. 179 (3 turndowns); Rec. 187 (3 turndowns); Rec. 216 (7 turndowns); Rec. 251 (4 turndowns); Rec. 257 (8 turndowns).

plained that if Mr. Adler had not taken the case, it is very likely that no other competent Title VII attorney in the Washington, D.C., area would have done so. Rec. 256 (Decl. of Joseph Sellers). For this legal services organization, the "only hope" of finding competent counsel would have been at one of the larger firms on a *pro bono* basis, but those firms "only accept a limited number of cases" and it was doubtful that Mrs. King's case could have been placed at all. *Id.*

According to the individual who was the Director of the District of Columbia Bar's Public Service Activities Program from 1984 through 1987, it was "impossible" for her to find legal representation for many callers complaining of employment discrimination, in large part because of the limited number of attorneys willing to accept such cases on a contingent fee basis. Rec. 87 (Decl. of Ann Barker). Similarly, the Director-Counsel of the NAACP Legal Defense and Educational Fund, with twenty years of relevant litigation and bar activity experience, explained that "many meritorious Title VII employment discrimination cases will not be brought" absent fee enhancement for contingency, and that because of the risks involved, "it has been and remains difficult to staff Title VII cases with experienced and competent lawyers." Rec. 115-18 (Decl. of Julius Chambers).

2. *The Amount of Risk Enhancement*

Among competent local Title VII lawyers, the general practice was and is to accept a contingent case such as Mrs. King's, if at all, only with the expectation of a contingency enhancement of 100 percent or more of the amount at risk. On this point, the following statement is typical of the record:

> At one time I did accept employment discrimination clients based on a reduced rate with the intent of recovering court-awarded fees based on my full rate if I prevailed, but I stopped this practice in 1981.

> I do not accept cases wherein my only compensation will be court-awarded fees in the event I prevail because of the risk of nonpayment and the delay in receipt of any payment.
>
> *A contingency enhancement of 100% above my hourly rate would be necessary before I would consider accepting a contingent case even from an individual plaintiff.*[10]

With respect to the broader class of all contingency cases within the District of Columbia, the established practice of local lawyers, both in the early 1980's and since, has been to accept contingent cases only if there is a reasonable prospect of at least doubling their standard hourly fees in the event of a favorable outcome.[11] Title VII cases are not treated differently from others with respect to such risk analysis. For instance, one attorney explained:

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[10] Rec. 92-93 (Decl. of Joel Bennett) (emphasis added); *see also* Rec. 168-69 (Decl. of John Erickson: at least 100 percent enhancement); Rec. 266 (Decl. of Gary Simpson: would accept a discrimination case on a contingent basis only with a 100 percent contingency bonus).

[11] Rec. 82-83 (Decl. of Nora Bailey: tax disputes; multiple of two or three); Rec. 133 (Decl. of John Clifford: general practice, including employment and personal injury cases; accepts contingency case only when there is a prospect of recovering triple the normal fees, if successful); Rec. 146-49 (Decl. of Vincent Curtis, Jr.: comparative license proceedings before the FCC); Rec. 165-66 (Decl. of Steven Engleberg: civil litigation, including personal injury, commercial, and malpractice cases); Rec. 191-92 (Decl. of Peter Kadzik: various types of complex federal litigation); Rec. 193-200 (Decl. of Chester Kamin: partial contingent fee arrangement in antitrust case); Rec. 276-77 (Decl. of Arnold Spevak: representation of tenant associations in condominium conversions, and representation of a commercial client in contesting a local tax assessment); Rec. 296-98 (Decl. of Robert Weinberg: firm's contingent practice in tort cases); Rec. 300-01 (Decl. of Kirkwood White: rezoning cases); Rec. 303-06 (Decl. of Henry Zapruder: tax disputes and litigation).

> I have become quite familiar with the practices used by law firms in the setting of hourly rates for legal fees, as well as the economic considerations underlying the acceptance of a case on a contingency (or fee shifting) basis.
>
> In deciding whether to undertake a Title VII case where collection of the legal fee is partially or totally contingent on a successful outcome, it is my experience that attorneys consider the *same economic factors* as they would in other types of claims, such as contract, commercial, real estate or personal injury, where the legal fees are to be paid on a contingent basis. *The underlying nature of the claim does not generally affect the analysis.*[12]

Thus, among members of the local bar, the prevailing threshold for accepting contingent cases has been and remains risk enhancement of 100 percent or greater.

E. The District Court Decision on Risk Enhancement

In March 1986, following the D.C. Circuit's decision on the merits, Mr. Adler submitted an application for an interim award of attorney's fees and costs. Several rounds of interim awards and further submissions then followed, including a request for contingency enhancement. After this Court's decision in *Delaware Valley II*, with its focus on the marketplace for legal services, Mr. Adler again applied for a contingency enhancement, this time supporting the request with affidavits regarding the market and seeking a market-based adjustment of 100 percent.

On September 20, 1988, the district court awarded plaintiff a fifty percent enhancement for the risk of nonpay-

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[12] Rec. 229-30 (Decl. of Jane Lang McGrew) (emphasis added); *see also* Rec. 96 (Supp. Decl. of Joel Bennett); Rec. 136 (Supp. Decl. of John Clifford); Rec. 159-60 (Supp. Decl. of David Dorsen); Rec. 168, 170 (Decl. of John Erickson); Rec. 191 (Decl. of Peter Kadzik); Rec. 269 (Decl. of Gary Simpson).

ment. App. 75a.[13] The district court applied the standards established by Justice O'Connor's concurrence in *Delaware Valley II*. The court held that Mrs. King had offered evidence that "many lawyers in the civil rights employment discrimination market would not accept employment in a case like this on a purely contingency fee basis." App. 73a. Previously, the district court had given weight to the "affidavits of several attorneys who represent plaintiffs in employment litigation which indicate that their firms would not have agreed to represent Mrs. King on a contingent basis." App. 87a.[14]

F. The Panel Decision of the Court of Appeals

Both Mrs. King and the District appealed. Regarding the level of risk compensation found in the relevant market, the panel determined that "the bulk of the evidence supports a 100 percent enhancement as to both the current and the 1983 markets." App. 58a (omitting record citations). As to the "substantial difficulty" standard, the panel found abundant support in the district court

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[13] This led to a total award of $113,858.31, based on the entire contingent portion of the previously awarded lodestar fee ($232,707.62—$5,000=$227,707.62).

[14] The district court found, however, that because the fee arrangement in the instant case was only partially contingent, there was a "crucial distinction" between it and the fee arrangement in *McKenzie*, 684 F. Supp. 1097. App. 74a. Instead, the district court relied on *Palmer*, 679 F. Supp. 68, which involved a partially contingent arrangement. App. 74a. In that case, the court had determined that "'attorneys in the Washington, D.C., community will only accept a fully contingent case if their recovery will be at least double their normal hourly billing rate and will accept a partially contingent case only if their recovery is enhanced by at least 50 percent.'" App. 74a (quoting *Palmer*, 679 F. Supp. at 74). Noting that it was adhering to Justice O'Connor's suggestion in *Delaware Valley II* that "each court let a determination such as Judge Smith's [in *Palmer v. Shultz*] control future cases such as this one," the district court ordered a fifty percent enhancement. App. 74a-75a.

record for such a showing. App. 61a-62a. The panel pointed to Mr. Adler's own statement "that he would not have accepted the case without the possibility of risk enhancement." App. 62a.[15] The panel also found that the requisite finding "was implicit in the [district] court's citation to the [*Palmer v. Shultz*] court's findings that attorneys in the District would not accept contingent cases without some risk enhancement." App. 61a (record citation omitted).

Based on both the record evidence and on prior cases, the panel concluded that "the same percentage enhancement should be applied to the contingent portion of a fee regardless whether the case is fully or partially contingent." App. 58a. As a result, the panel ordered that except as to the $5000 amount not at risk in this case, the attorney's fees should be enhanced by 100 percent. App. 64a.

G. The Decision of the Court of Appeals En Banc

Upon rehearing *en banc*, the D.C. Circuit overruled the panel and reversed "the contingency enhancement portion of the attorney's fees allowed to appellant." App. 27a. The seven-judge majority held that the 4-1-4 decision in *Delaware Valley II* "provides no controlling legal holding" and that the result there precluded a contingency enhancement in this case. App. 25a. Having freed itself from *Delaware Valley II*, the court then decided—without any statutory analysis—that "contingency enhancements will not be available in this Circuit." App. 26a. The court below concluded:

> We have done our best to apply *Delaware Valley II* but have been unable to derive a governing rule from the opinion. Considering our struggle to un-

[15] The panel also explained that the "substantial difficulty" test is a counterfactual one, and that applicants "'are not required to show that plaintiffs actually did face difficulty.'" App. 61a (quoting *McKenzie*, 875 F.2d at 332-33, 337).

> derstand and apply *Delaware Valley II* as well as the difficulties our sister circuits have experienced, we urge the Supreme Court to clarify its position.

App. 27a.

The rationale of the majority opinion *en banc* appears to consist of several elements. Primarily, the court found that "*Delaware Valley II* involves three distinct approaches to the issue of contingency enhancements in fee-shifting statutes, none of which enjoys the support of five Justices." App. 22a. After reviewing various methods of analyzing split Supreme Court decisions, the majority opinion concluded that there was no way to deduce a rule of law from *Delaware Valley II*. In particular, the court concluded that Justice O'Connor's lone concurrence could not be joined with the broader approach expressed in the four-justice dissent, in order to provide a majority rule for future contingency enhancement cases. App. 24a-25a.

In addition, the majority spoke of the difficulties it found in applying certain aspects of Justice O'Connor's approach: its "trouble determining the *content* of that 'substantial difficulties' label—that is, determining just how 'substantial' the 'difficulties' in attracting counsel have to be, and how they must be proven." App. 12a. The majority also claimed that "there simply is no practical middle ground between providing [risk] enhancements routinely and not providing them at all." App. 26a. This led to the decision to bar risk enhancement in all cases. App. 26a.

Furthermore, in dicta, the court below reviewed the evidence before the trial court and found it to be not sufficiently "weighty" to satisfy the tests set forth in Justice O'Connor's concurrence, even assuming it to be the controlling authority. App. 15a-17a.[16] The majority

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[16] The majority also construed Justice O'Connor's concurrence to require a showing of "actual difficulties" by the plaintiff in locating counsel. But the "would have faced substantial difficulties" test is plainly a counterfactual one. *See infra* at n.21 (citing cases).

opinion gave no indication that the factual findings of the district court were entitled to any deference upon appeal, and never stated what standard of review it was employing to reverse those findings.

Four judges dissented from the decision *en banc*. The dissent emphasized the statutory standard of a "reasonable attorney's fee" and this Court's pronouncement that the trial court should enjoy wide discretion and considerable deference upon appeal as to " 'what essentially are factual matters.' " App. 28a-29a (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). The dissent also observed that "the majority's new rule, that contingency awards are never justified, is completely without foundation. Twelve other circuits have reviewed the question at hand, and not one other circuit has adopted a rule that completely bars contingency enhancement." App. 28a. Finally, the dissent argued as a matter of statutory interpretation that a "reasonable" attorney's fee must necessarily encompass an appropriate adjustment for the risk of non-payment in contingency cases, in that lawyers customarily and reasonably required some such enhancement. App. 33a-35a, 40a.

REASONS FOR GRANTING THE WRIT

The issue of contingency enhancement presented in this case is one of major national importance, as confirmed by this Court's recent decision to review the issue in another case. The availability of risk enhancement in contingent fee cases is essential to the purpose of Congress in enacting federal fee-shifting statutes: ensuring competent legal representation to private claimants in selected areas of special public importance. The decision of the D.C. Circuit creates, for the first time since *Delaware Valley II*, a split among the circuits on the basic availability of risk enhancement. In addition, the decision below—holding (like *Dague*) that *Delaware Valley II* provides no rule of law, but (unlike *Dague*) that risk enhancement is

never available—presents the perfect legal complement to the case already before the Court. The two cases should be consolidated for further briefing and consideration on the merits.

The record in this case lays out the contingency enhancement issue in a factual depth and breadth not available in the case already before the Court, and thus offers the better vehicle for resolution of the question presented. The difficulty this Court and others have had with contingency enhancement appears to have been more practical than analytical. The record here reflects the actual contingent fee practices of a host of lawyers and law firms in the District of Columbia—a record of the kind missing in both *Delaware Valley II* and *Dague*. The special need to craft realistic and manageable rules in this area demands the richest available factual context as the backdrop for judicial decisionmaking.

Review should also be granted because the decision of the D.C. Circuit is fundamentally wrong in at least two respects. First, as a matter of plain language, commonsense interpretation of the statutory term "a reasonable attorney's fee," risk enhancement cannot be absolutely precluded in all cases. Second, the D.C. Circuit exceeded its appellate role in this case when it reversed the factual findings made by the district court without articulating any recognized legal basis for doing so.

I. THE QUESTION OF CONTINGENCY ENHANCEMENT IN STATUTORY ATTORNEY'S FEES AWARDS IS AN IMPORTANT ONE

The question presented—whether and when risk enhancement is available for statutory attorney's fees awards in contingency cases—is plainly an important issue of federal statutory law. The question is common to attorney's fees litigation in over one hundred federal statutes in which Congress has allowed the payment of a "reasonable attorney's fee" to a prevailing party, in

order to encourage private party vindication of selected public rights.[17] In a number of areas of federal litigation covered by fee-shifting statutes, contingency practice is significant. As shown by the record below, a categorical rule against risk enhancement would leave many poorer plaintiffs unrepresented, and would thus defeat the intent of Congress to put them on equal footing in the marketplace for legal services.

This Court specifically reserved the question of contingency enhancement twice: first in *Blum v. Stenson*, 465 U.S. 886, 897-902 (1984), and again in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. at 564-66 (1986) ("*Delaware Valley I*"). Then, in *Delaware Valley II*, the Court addressed the question directly, but in the resulting decision no one opinion was able to command the votes of five justices. *See supra*, at 4-6 (discussing the three opinions). Notably, the record was extremely sparse in *Delaware Valley* as to the circumstances and market context under which the prevailing party and counsel entered into their contingency agreement.[18]

The lower federal courts have been left to grapple with the diverse implications of *Delaware Valley II*. A number of courts have expressed uncertainty, even frustration, in practical application of this Court's decision. The court below, for instance, spoke of its "quandary" and its

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[17] *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 (1986).

[18] *See Delaware Valley II*, 483 U.S. at 714-15 (statement of background facts noting the existence of a contingent fee agreement but providing no further details); *Delaware Valley I*, 478 U.S. at 555 (same); *Delaware Valley Citizens' Council For Clean Air v. Pennsylvania*, 762 F.2d 272, 280-82 (3d Cir. 1985) (same). Outside counsel for the prevailing party was a public interest law firm.

"difficulties" in attempting to apply various elements of *Delaware Valley II*.[19]

In addition, there have been differences over which parts of the *Delaware Valley II* decision are legally authoritative. Justice O'Connor's concurring opinion has been held by the plurality of the courts of appeals, five in all, to be the controlling authority for risk enhancement.[20] Four other courts of appeals have also found contingency enhancement to be available under *Delaware Valley II*, but based on the narrower grounds afforded by the plurality opinion.[21]

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[19] App. 17a-18a; *see also Smith v. Freeman*, 921 F.2d 1120, 1123 (10th Cir. 1990) (court finds it problematic to apply *Delaware Valley II* in a way which will not result in attorney's fee litigation in every case); *Kelly v. Matlack, Inc.*, 903 F.2d 976, 986 (3d Cir. 1990) (describing the application of *Delaware Valley II* as "the elusive task of deciding when to augment a lodestar with a multiplier"); *Rode v. Dellarciprete*, 892 F.2d 1177, 1184 (3d Cir. 1990) (in order for the court to apply *Delaware Valley II* standards, fee applicant may be required to produce the testimony of an economist); *Student Public Interest Res. Group v. AT&T Bell Lab*, 842 F.2d 1436, 1451-52 (3d Cir. 1988) (court lists various problems applying *Delaware Valley II* including determining the weight, if any, to be given the likelihood of success in the case and the scope of market research evidence required).

[20] *See Kelly*, 903 F.2d at 986-87; *Alberti v. Klevenhagen*, 896 F.2d 927, 936 (5th Cir.), *reh'g granted in part*, 903 F.2d 352 (5th Cir. 1990); *Morris v. American Nat'l Can Corp.*, 941 F.2d 710, 715 (8th Cir. 1991); *Bouman v. Block*, 940 F.2d 1211, 1235-36 (9th Cir.), *cert. denied*, 112 S. Ct. 640 (1991); *Crumbaker v. Merit Sys. Protection Bd.*, 827 F.2d 761, 761 (Fed. Cir. 1987).

[21] *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 553 (7th Cir. 1991) (following that part of the plurality's opinion with which Justice O'Connor agrees as the *Delaware Valley II* "holding"); *Smith*, 921 F.2d at 1123 (quoting the *Delaware Valley II* plurality that "enhancement for the risk of nonpayment should be reserved for exceptional cases where the need and justification for such enhancement are readily apparent and are supported by evidence in the record and specific findings by the courts"); *Martin v. University of S. Alabama*, 911 F.2d 604, 610-12 (11th Cir. 1990)

The D.C. Circuit has now joined the Second Circuit in *Dague v. City of Burlington*, 935 F.2d 1343, 1360 (2d Cir. 1991), and the Sixth Circuit in *Perotti v. Seiter*, 935 F.2d 761, 765 (6th Cir. 1991), in concluding not only that Justice O'Connor's concurrence is not controlling, but that *Delaware Valley II* states no rule of law whatever. App. 22a-25a.[22] But whereas the Second and Sixth Circuits held that contingency enhancement was still available under the law of those circuits,[23] the D.C. Circuit held categorically that contingency enhancement is *never* available. App. 26a.[24] In implicit recognition of the legislative fiat involved in this decision, the court below expressly "urge[d] the Supreme Court to clarify its position." App. 27a.

The decision below creates a clear conflict among the circuits. The Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Federal Circuits have held that contingency enhancements may be granted in appropriate cases, and the First and Fourth Circuits have so indicated.[25] Although the court below is alone, this is

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(adopting the *Delaware Valley II* plurality's requirement that a fee applicant prove that without a contingency enhancement the plaintiff "would have faced substantial difficulties in finding counsel"); *Craig v. Dep't of Health & Human Servs.*, 864 F.2d 324, 328 (4th Cir. 1989) (dicta) (reading *Delaware Valley II* to permit enhancement in "exceptional circumstances").

[22] The decision below did not cite *Dague* or *Perotti*.

[23] *Dague*, 935 F.2d at 1360; *Perotti*, 935 F.2d at 765.

[24] In *Dague*, the Second Circuit proceeded to decide the case based on its own pre-*Delaware Valley II* standards, and affirmed the contingency enhancement on that basis. 935 F.2d at 1360.

[25] In numerical order by circuit: *Jacobs v. Mancuso*, 825 F.2d 559, 561 (1st Cir. 1987) (disallowing contingency, not because of per se rule, but because "liability here was so plain . . . that, as a practical matter, the risk of not recovering a fee was all but eliminated"); *Dague*, 935 F.2d at 1360 (2d Cir. 1991); *Kelly*, 903 F.2d at 986-87 (3d Cir. 1990) (mandatory prerequisite to award

still a significant circuit split since a disproportionate amount of litigation under federal fee-shifting statutes is conducted within the District of Columbia.

Most important, since the decision below and its call for Supreme Court review, the Court has granted review in *Dague*, framing essentially the same question as presented here:

> May a court, in determining a reasonable attorney's fee award . . . enhance the fee award above the lodestar amount in order to reflect the fact that the attorneys had taken the case on a contingent-fee basis, thus assuming the risk of receiving no attorney's fees at all?

Dague, No. 91-810, *cert. granted* (U.S., Jan. 27, 1992).[26] Thus, the issue has already been adjudged to be an im-

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of an enhancement is that plaintiff "establish that without adjustment it would have faced substantial difficulties in finding counsel in the . . . relevant market") (citations omitted); *Craig*, 864 F.2d at 328 (4th Cir. 1989) (dicta); *Alberti*, 896 F.2d at 936 (enhancement available when district court "make[s] the findings required by Justice O'Connor's concurrence in *Delaware Valley II*" which is considered "the authoritative pronouncement of the Court"), *reh'g granted in part*, 903 F.2d 352 (5th Cir. 1990); *Perotti*, 935 F.2d at 765 (6th Cir. 1991); *Soto*, 941 F.2d at 553 (7th Cir. 1991); *Morris*, 941 F.2d at 715 (8th Cir. 1991) ("Justice O'Connor's opinion in *Delaware Valley II* is the current legal standard for awarding contingency enhancements."); *Bouman*, 940 F.2d at 1235-36 (9th Cir. 1991) (upholding fee on the basis of district court's findings matching Justice O'Connor's test); *Smith*, 921 F.2d at 1123 (10th Cir. 1990); *Martin*, 911 F.2d at 612 (11th Cir. 1990); *Crumbaker*, 827 F.2d at 761 (Fed. Cir. 1987) ("the Board on remand shall consider the degree to which the relevant market compensates for contingency and whether any enhancement is necessary to bring the fee within a range that would attract competent counsel"). *See also supra* at 20 & nn.20-21.

[26] The statutes at issue in *Dague* are environmental statutes: the Solid Waste Disposal Act, 42 U.S.C. § 6901, *et seq.* and the Clean Water Act, 33 U.S.C. § 1251, *et seq.* However, the attorney's fees provisions are essentially identical to the Title VII attorney's fees provision at issue here. *See* 42 U.S.C. § 6972(e)

portant one, and the conflict created by the decision below heightens that importance.

II. THIS CASE PRESENTS THE CONTINGENCY ENHANCEMENT ISSUE IN THE CONTEXT OF A FULLY DEVELOPED FACTUAL RECORD, EXTENSIVELY REFLECTING THE REALITIES OF CONTINGENCY PRACTICE

This case presents an exceptionally well suited vehicle for resolution of the issue presented. As indicated above at 19-20 and note 19, the courts' handling of contingency enhancement seems to have suffered from a lack of practicality as well as from a lack of unanimity. There seems to be a gap between present law and the day-to-day world of contingent fee practice—a gap that argues strongly for devising future rules for risk enhancement based only on the fullest possible understanding of the marketplace.

The record in this case reflects in great depth the background, evolution, and context of contingent fee practice in the District of Columbia in the early to mid-1980's. Thus, the record contains a wealth of insights into why, how, and when litigating lawyers are willing to take cases on a contingent fee basis—and with what expectations of their added compensation in the event of success on the merits. This contrasts markedly with *Dague*, in which the risk enhancement issue was a peripheral one, and in which the record was thin. Scores of affidavits are found in the record below, including from: (1) counsel in the underlying case; (2) other lawyers, specifically regarding this case; (3) local lawyers who generally practice Title VII and employment law; (4) lawyers who practice in other areas of complex federal litigation in the District of Columbia, sometimes on a contingent fee basis; and (5) *pro se* plaintiffs in similar cases, who

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(allowing for an award of reasonable attorney's fees); 33 U.S.C. § 1365(d) (same); 42 U.S.C. § 2000e-5(k) (providing for the award of reasonable attorney's fees to the prevailing party).

were turned down in seeking competent counsel on a contingency basis.

The attorney affidavits cover the billing practices not just of individual lawyers, but of *law firms*, some substantial in size—accounting in all for hundreds of, perhaps over a thousand, lawyers. The record also covers an impressive cross-section of the District of Columbia bar—sole practitioners to large law firms, junior lawyers to experienced Title VII specialists, public interest and for-profit lawyers. Moreover, the record evidence also goes to both of the two critical factual issues under Justice O'Connor's concurrence in *Delaware Valley II*: (1) "how a particular market compensates for contingency" in a category of cases; and (2) whether the individual plaintiff " 'would have faced substantial difficulties in finding counsel in the local or other relevant market.' " [27] Thus, the record covers both the general and the specific, and in so doing demonstrates graphically why contingency enhancement is a necessary component of a "reasonable attorney's fee." In a straightforward, empirical way, the record underscores the point that without contingency enhancement, many plaintiffs—the most economically disadvantaged—will be left entirely without lawyers to advance their claims.

In *Dague*, by contrast, the record on contingency enhancement appears to be quite meager. Contingency enhancement was a side issue in *Dague*, incompletely developed. The appendix to the petition for writ of certiorari in that case, although lengthy, contains no affidavits or other evidentiary material of any kind on the issue on which the writ was granted.[28]

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[27] 483 U.S. at 733 (citation omitted). *See supra* at 11-13 (threshold of contingency enhancement of 100 percent or greater), at 8-11 (substantial difficulties that would have been encountered absent the prospect of risk enhancement).

[28] Petition for Writ of Certiorari and Appendix, *City of Burlington v. Dague*, No. 91-810 (U.S. filed Nov. 18, 1991).

The decisions below are also far sparser on risk enhancement in *Dague* than in this case. Less than two pages of the Second Circuit's opinion were directed to the issue, with only the most cursory analysis of the facts. *Dague*, 935 F.2d at 1359-60. The order of the district court awarding attorney's fees contains only about two pages on contingency enhancement—again with only very summary references to the record, and with nothing at all quantifying the degree of risk enhancement prevailing in the marketplace.[29] In this case, the extensive opinions below are devoted almost exclusively to the risk enhancement issue. App. 1a-128a.

After a decade of uncertainty on the question of risk enhancement, what is needed now is a set of definitive standards that effectuate the statutory mandate of reasonableness in attorney's fees awards, recognize the realities of contingency practice within the greater context of the market for legal services, and are readily administrable by district courts in the kinds of factual scenarios they actually encounter. This case offers the best opportunity and context for the Court to develop effective standards in this area.

III. THE DECISION BELOW IS INCORRECT BOTH AS TO THE STATUTORY UNAVAILABILITY OF RISK ENHANCEMENT, AND IN THE MANNER IN WHICH IT REVIEWED THE FACTS FOUND BY THE DISTRICT COURT

The decision of the D.C. Circuit is fundamentally incorrect on the unavailability of contingency enhancement. The court below offered no explanation of how the statutory term, "a reasonable attorney's fee," could entirely exclude something so thoroughly reasonable as the risk enhancement of an attorney's fee in a case taken on a

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[29] Petition for Writ of Certiorari and Appendix, *City of Burlington v. Dague*, No. 91-810 at App. 131a-33 (reproducing district court order dated April 2, 1990).

contingency basis. *Common sense and all of the empirical evidence dictate that attorneys who take cases on a contingent basis demand, in the event of success, compensation greater than the rates they normally charge and are paid in non-contingent cases where they run no risk of non-payment. See supra* at 7-13, *infra* at 29 (evidence of contingency practice in the District of Columbia).[30]

The legal services market has determined that a reasonable fee for a case where payment is contingent on winning includes risk enhancement. Justice O'Connor's concurrence was correct to recognize this reality, and to take a market-based approach to fixing the amount of the contingency enhancement. *Delaware Valley II*, 483 U.S. at 732-34.[31] There is no reason why attorney's fees awards—which are required by statute to be *reasonable*—should not reflect the economic reality of the general marketplace for legal services. The decision below is particularly radical in that it would deny risk enhancement in *all* cases, even where all the evidence establishes and the

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[30] *See also* Canons of Ethics, § 12, 33 A.B.A. Rep. 575, 578 (1908) (whether the payment of a fee is contingent on success is a proper consideration in assessing the reasonableness of a fee); Model Code of Professional Responsibility DR 2-106(B)(8) (1980) (same); Model Rules of Professional Conduct Rule 1.5(a)(8) (1983) (same). The A.B.A. filed a brief in the case below, expressing its continuing view that contingency enhancement is fully appropriate under federal fee-shifting statutes. *King v. Palmer*, Nos. 89-7027, 87-7028, Brief of American Bar Association As *Amicus Curiae* in Support of Appellant (D.C. Cir. filed Nov. 14, 1990).

[31] A market-oriented approach makes sense because it permits judges to make their decisions on risk enhancement based on the economic evidence available, rather than substituting their own values for the private valuations that markets exist to balance out. For other issues arising under fee-shifting statutes, a market-oriented approach has predominated. *See, e.g., Blum*, 465 U.S. at 895-96 (reasonable hourly rate is the prevailing market rate in the relevant legal community); *Hensley*, 461 U.S. at 437 (number of hours reasonably expended determinable by reference to "billing judgment" common in private practice).

trial court concludes that *no* counsel would take a meritorious case on a contingency basis without a risk enhancement.

The majority opinion of the D.C. Circuit not only ignores statutory text and market economics, but also misconstrues this Court's decision in *Delaware Valley II*. Justice O'Connor wrote only for herself, but was far from alone in substance when she stated that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under fee shifting provisions." 483 U.S. at 731. This position was obviously joined by the four justices in dissent. *Id.* at 755. The plurality acknowledged in Part V of its opinion that a majority of justices were in favor of risk enhancement in certain circumstances: there is little other explanation for the plurality's elaboration that if it is to be given at all, "enhancement for the risk of non-payment should be reserved for exceptional cases where the need and justification . . . are readily apparent and are supported by evidence in the record and specific findings by the courts." *Id.* at 728.

Thus, the court below converted a set of three different rules from *Delaware Valley II*, each conditional, into a single categorical rule. Faced with the three separate opinions in *Delaware Valley II*—which might be best summarized in one word each as "Seldom," "Sometimes," and "Often"—the D.C. Circuit came up with a rule of "Never." This makes no sense. Contrary to the decision below, a majority of this Court has expressed the view that risk enhancement is appropriate under certain circumstances, and there is no reason now to reverse that fundamental decision.[32]

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[32] Plainly, the court below was not free, as invited by the District, to revisit that decision based on subsequent changes in the composition of this Court. *See* Brief for Appellees/Cross-Appellants, at 21 & n.32 (Dec. 20, 1990) (questioning the precedential value of *Delaware Valley II*, in part because "[n]ow, of

The Court of Appeals was also wrong, even in dicta, to override the *factual* conclusions that the district court made in the course of awarding contingency enhancement under the standards of Justice O'Connor's concurrence. App. 15a-17a.[33] This was done without any deference to the trial court, without any articulation of a standard of review, and with minimal attention to the actual record. The evidence before the district court, and on which it ruled in favor of risk enhancement, strongly established that Mrs. King would have faced substantial difficulties in locating counsel in the absence of risk enhancement, and that the prevailing market threshold was 100 percent risk enhancement in contingent fee cases.[34]

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course, a *Delaware Valley II* dissenter (as well as a member of the plurality) has retired and has been replaced"); *see also Dague*, 935 F.2d at 1360 (noting change in justices). The lower federal courts should not be encouraged or permitted to speculate on how changes in the membership of this Court might cause it to modify its past decisions.

[33] The majority's conversion of the counterfactual "substantial difficulties" test into "actual difficulties" test was equally unwarranted. A number of other lower federal courts have rejected such an "actual difficulties" test. *E.g., Lattimore v. Oman Constr.*, 868 F.2d 437 (11th Cir.), *reh'g denied en banc*, 875 F.2d 874 (11th Cir. 1989) (basing risk enhancement, inter alia, on difficulties experienced by local bar association and the court itself in finding counsel for employment discrimination cases); *Hendrickson v. Branstad*, 740 F. Supp. 636, 646 (N.D. Iowa 1990), *aff'd in part, rev'd in part*, 934 F.2d 158 (8th Cir. 1991); *Robinson v. Alabama State Dep't of Educ.*, 727 F. Supp. 1422, 1432 & n.29 (M.D. Ala. 1989), *aff'd without op.*, 918 F.2d 183 (11th Cir. 1990), *reh'g denied en banc*, 930 F.2d 925 (11th Cir. 1991); *Norwood v. Charlotte Memorial Hosp. & Medical Center*, 720 F. Supp. 543, 554-56 (W.D.N.C. 1989) (historical and current difficulties: "prospective plaintiffs with what appear to be good cases are being turned away").

[34] *See supra*, at 7-13. This conclusion is consistent with the results of the other post-*Delaware Valley II* fee enhancement cases in the D.C. Circuit, which were also based on substantial evidence regarding the local market for contingent legal services. *See* cases cited *supra*, at nn. 3 & 4. In other parts of the nation, risk enhancements of 100 percent have been granted and affirmed based on

As a matter of law, the district court's findings of fact as to attorney's fees may be overturned only if they amount to an abuse of discretion.[35] As this Court has observed, deference is due to the trial court both "in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437. Thus, the comments in the majority opinion below that the uncontradicted attorney affidavits are self-interested and should not be considered "weighty" (even when taken from lawyers practicing entirely outside the Title VII field and other areas of law involving fee-shifting statutes) hardly suffice to justify appellate reversal on the facts. *See* App. 15a-17a. The trial court ruled properly on all the evidence before it.[36]

Perhaps the majority's view of the facts in this case was infected by its dissatisfaction with the law applied

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Delaware Valley II market analysis, given the shortage of attorneys willing to take on relevant cases absent such an inducement. *E.g., Lattimore v. Oman Constr.*, 868 F.2d at 439; *Fadhl v. San Francisco*, 859 F.2d 649, 651 (9th Cir. 1988) (per curiam); *Norwood v. Charlotte Memorial Hosp. & Medical Center*, 720 F. Supp. at 554-56 (W.D.N.C. 1989); *Stokes v. Montgomery*, 706 F. Supp. 811, 817-18 (M.D. Ala. 1988); *see also Rabin v. Concord Assets Group, Inc.*, 1991 WL 275757 (S.D.N.Y. 1991) (common fund case: granting a multiplier of 4.4 in part based on risk enhancement, finding that multipliers " 'between 3 and 4.5 have been common.' "). Naturally, lesser enhancements have been granted in other relevant markets. The experience in the District of Columbia, however, cannot be viewed as aberrant.

[35] *See Evans v. Jeff D.*, 475 U.S. 717, 742-43, *reh'g denied*, 476 U.S. 1179 (1986); *Blum*, 465 U.S. at 896.

[36] *See supra* at 7-13 (summarizing the record). The District, with every incentive to identify competent practitioners who would have taken the case on a contingent basis without the prospect of risk enhancement, failed to name even one. One affiant introduced by petitioner indicated that his firm would accept a case on a contingency, with a risk enhancement of at least 33%. Rec. 224 (Decl. of Bradley McDonald). In the end, Mrs. King's extensive showing went unrebutted.

by the district court. In any event, if this Court ultimately concludes that Justice O'Connor's concurrence does constitute the controlling authority for risk enhancement, then the decision of the D.C. Circuit *en banc* should be reversed and the contingency enhancement of 100 percent reinstated.

CONCLUSION

For these reasons a writ of certiorari should issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, and this case should be consolidated with *City of Burlington v. Dague*, No. 91-810, for briefing and consideration on the merits.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued *En Banc* February 27, 1991

Decided December 13, 1991

No. 89-7027

MABEL A. KING,

Appellant

v.

JAMES F. PALMER, DIRECTOR,
D.C. DEPARTMENT OF CORRECTIONS, *et al.*

No. 89-7028

MABEL A. KING

v.

JAMES F. PALMER, DIRECTOR,
D.C. DEPARTMENT OF CORRECTIONS, *et al.*,

Appellants

Appeals from the United States District Court
for the District of Columbia

(Civil Action No. 83-1980)

Roger E. Warin, with whom *Bryan T. Veis* was on the brief, for appellant in 89-7027 and appellee in 89-7028.

Robert M. Adler and *Joel P. Bennett* also entered appearances for appellants.

Donna M. Murasky, Assistant Corporation Counsel, with whom *Herbert O. Reid, Sr.*, Corporation Counsel, *John Payton*, Acting Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for appellees in 89-7027 and appellants in 89-7028. *Susan S. McDonald*, Assistant Corporation Counsel, also entered an appearance for appellees in 89-7027 and appellants in 89-7028.

Michael J. Ryan, Assistant United States Attorney, with whom *Stuart M. Gerson*, Assistant Attorney General, *Jay B. Stephens*, United States Attorney, *John Oliver Birch* and *R. Craig Lawrence*, Assistant United States Attorneys, were on the brief, for *amicus curiae* the United States of America in 89-7027 and 89-7028 urging reversal.

John J. Curtin, Jr., *Rex E. Lee*, *Carter G. Phillips*, and *Joseph R. Guerra* were on the brief for *amicus curiae* The American Bar Association in 89-7027 and 89-7028 urging that the panel's decision be reinstated without modification.

Daniel B. Edelman, *Barry Goldstein*, and *Mari Mayeda* were on the brief for *amici curiae* Joel P. Bennett, et al. in 89-7027 and 89-7028 urging that the panel's decision be reinstated without modification.

Blair G. Brown, *Brenda V. Smith*, and *Richard S. Seligman* were on the brief for *amicus curiae* the District of Columbia Bar in 89-7027 and 89-7028 urging that the panel's decision be reinstated.

Charles Setphen Ralston for NAACP Legal Defense Fund and Educational Fund; *E. Richard Larson* for Mexican American Legal Defense and Educational Fund; *Joseph M. Sellers* for Washington Lawyers' Committee for Civil Rights under Law; *Gregory O'Duden*, *Elaine Kaplan*, and *Timothy Hannapel* for National Treasury Employees Union; and *Paul M. Smith* for Washington

Council of Lawyers, were on the joint brief for *amici curiae* in 89-7027 and 89-7028 urging that the panel's opinion be reinstated.

Daniel J. Popeo entered an appearance for *amicus curiae* The Washington Legal Foundation and the Allied Educational Foundation in 89-7027 and 89-7028 urging reversal.

Before: MIKVA, *Chief Judge*, WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, THOMAS,* HENDERSON, and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by SILBERMAN, *Circuit Judge*, in which BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges*, concur.

Dissenting opinion filed by EDWARDS, *Circuit Judge*, with whom MIKVA, *Chief Judge*, WALD and RUTH B. GINSBURG, *Circuit Judges*, join.

SILBERMAN, *Circuit Judge*, in which BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges*, concur: This case concerns the circumstances in which a court making an award of reasonable attorney's fees under federal fee-shifting statutes may augment the lodestar with a contingency enhancement designed to compensate the prevailing party's attorney for the risk of losing the case. The panel opinion in this case, *King v. Palmer*, 906 F.2d 762 (D.C. Cir. 1990), reviewed a district court award of attorney's fees and costs made to the plaintiff, Mabel King, pursuant to the fee-shifting provisions of Title VII. *See* 42 U.S.C. §§ 2000e-5(k), 2000e-16(d).[1] The panel rejected the Dis-

* Shortly after oral argument, Judge (now Justice) Thomas recused himself and has not participated in this decision.

[1] 42 U.S.C. § 2000e-5(k) provides in pertinent part:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

[Continued]

trict of Columbia's contention that no enhancement for the risk of nonpayment was proper but set aside the district court's award of an enhancement of 50% of attorney's fees subject to contingency, holding instead that Ms. King was entitled to a full 100% enhancement of those fees, relying on this court's decision in *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989). On September 12, 1990, we granted the District of Columbia's petition suggesting rehearing *en banc* to reconsider the holding on contingency enhancements in *McKenzie*. Having reviewed the issue *en banc*, we overrule *McKenzie* and reverse the award of a contingency enhancement to Ms. King.

I.

Mabel King brought a gender discrimination claim against her employer, the District of Columbia, and ultimately received an award of back pay and retroactive promotion. *See King v. Palmer*, 778 F.2d 878, 882 n.7 (D.C. Cir. 1985), *on remand*, Civ. No. 83-1980, Mem. at 1-5 (D.D.C. June 11, 1986). The history of the substantive litigation underlying the dispute over attorney's fees is summarized in the panel opinion. *See King*, 906 F.2d at 764.

Ms. King experienced no difficulty in securing an attornoy. She was represented throughout the litigation by the first attorney she contacted, Robert Adler, who took the case on a partial contingency basis. Ms. King contacted Mr. Adler as a result of his successful representation of a colleague of hers in another Title VII case, for which he had received a 10% contingency enhancement. Ms. King and Mr. Adler agreed that she would be re-

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[1] [Continued]

Section 2000e-16(d) extends the provisions of § 2000e-5(k) to actions by employees of the District of Columbia. Congress has made clear that it intends the courts to resolve the policy questions inherent in determining what is "reasonable." *See* H.R. REP. No. 1558, 94th Cong., 2d Sess. 8 (1976).

sponsible for litigation costs and expenses, as well as for fees of up to $5000, and that she would receive any award of damages, while Mr. Adler would receive any statutory attorney's fees that might be awarded, should Ms. King prevail. *See id.*

Mr. Adler averred that he took the case expecting that a contingency enhancement would be available. In his applications for attorney's fees following Ms. King's success on the merits, Mr. Adler twice requested a 35% fee bonus to compensate him for the risk of nonpayment he had borne during the litigation, but the district court held this request in abeyance pending the Supreme Court's decision concerning the availability of contingency enhancements in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware Valley II*). In the interim, the district court awarded a lodestar fee totaling $232,707.62, which comprised the reasonable number of hours Mr. Adler spent on the case multiplied by a reasonable hourly rate, and noted that a "15 [percent] bonus for the risk of not prevailing would . . . be appropriate in the event that such an award is authorized by the Supreme Court." *King v. Palmer*, Civ. No. 83-1980, Rev. Mem. at 13 (D.D.C. June 10, 1987) (*Mem. Op. I*).

After the Court issued its fragmented decision in *Delaware Valley II*, Mr. Adler reapplied for a contingency enhancement, increasing his request to 100%. Reading Justice O'Connor's concurrence in *Delaware Valley II* as controlling the availability and degree of contingency enhancement, the district court held that the plaintiff must establish how the market compensates for contingent cases on a class-wide basis and then show that without such enhancement she would have had substantial difficulty attracting competent counsel to her case. *See King v. Palmer*, Civ. No. 83-1980-LFO, Mem. at 2 (D.D.C. Sept. 20, 1988) (*Mem. Op. II*). In the district court's view, Ms. King met these requirements

by introducing affidavits from a number of local attorneys experienced in Title VII work asserting that they would not accept fee-shifting cases where fees were available only if the case was won, absent the prospect of contingency enhancements. *See id.* at 3. Since Ms. King had agreed to pay all costs and expenses and the first $5000 of fees, however, the district court found that Mr. Adler's representation of her was only partially contingent and awarded a 50% enhancement instead of the 100% requested, on the authority of an earlier district court opinion in *Palmer v. Schultz*, 679 F. Supp. 68 (D.D.C. 1988), *appeal dismissed*, No. 88-5108 (D.C. Cir. 1988). *See Mem. Op. II* at 3-4. Both parties appealed.

The panel, following our previous opinion in *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989), affirmed the district court's award of a contingency enhancement but increased it from 50% of the lodestar to 100%. *McKenzie* established a regime in which contingency enhancements would be routinely available in statutory fee-shifting cases. In reaching this result, the *McKenzie* panel treated Justice O'Connor's concurring opinion in *Delaware Valley II* as controlling and explicitly applied her admonition that "no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Delaware Valley II*, 483 U.S. at 733 (O'Connor, J., concurring in part and concurring in the judgment) (quoting plurality opinion at 731). The *McKenzie* majority described the inquiry to be conducted under this test as "counterfactual," meaning that plaintiffs "need not show that [they] *actually* experienced difficulty in obtaining representation," but merely that, "absent a contingency enhancement, plaintiffs *would have* encountered substantial difficulties in finding counsel . . . [at the time] they commenced their lawsuit." *McKenzie*, 875 F.2d at 337 (first emphasis added, second in original). Thus, the majority concluded

that a prevailing plaintiff under the typical fee-shifting statute could gain a contingency enhancement by producing affidavits from lawyers in the District of Columbia stating that those lawyers would not *normally* take a case on contingency unless they were paid more than their normal hourly fees if they won. Indeed, according to the majority, it was entirely irrelevant whether counsel in the case had been "attracted by the possibility of a contingency enhancement"; the panel dismissed as beside the point the fact that one of the lawyers who took the case, the head of the *pro bono* section of a major Washington law firm, candidly stated that his firm would have taken the case even without the prospect of a contingency enhancement. *Id.* at 338. The majority reasoned that were it to deny a contingency enhancement on an "actual difficulty" basis, it would simply encourage a "charade" in which "public interest lawyers would accept a case only after announcing loudly that they were doing so on the assumption of a contingency enhancement." *Id.* at 337-38. In short, under the *McKenzie* holding, even a plaintiff who easily found counsel and whose counsel presumably expected no contingency bonus could satisfy the "substantial difficulties" test.

Judge Buckley, dissenting on this issue, thought the *McKenzie* majority misread *Delaware Valley II*. He pointed out that "Justice O'Connor joined the plurality in requiring proof that *the prevailing party* 'would have faced substantial difficulties' in obtaining competent counsel . . . absent an upward fee adjustment for contingency risks." *Id.* at 340-41 (Buckley, J., concurring in part and dissenting in part) (quoting *Delaware Valley II*, 483 U.S. at 733 (emphasis in original)). That meant, according to Judge Buckley, that we were required to pursue an "individualized approach" in which evidence of *actual* difficulties would be extremely important. *Id.* at 341.

> Because the record establishes that McKenzie and his fellow plaintiffs had *in fact* located qualified lawyers willing to represent them in Washington, D.C.

> in the early 1970's, I conclude that under *Delaware Valley II these fee applicants have failed to prove that the prevailing party "would have faced substantial difficulties"* in securing competent attorneys absent the incentive of an enhanced fee.

Id. (emphasis added).

In accordance with *McKenzie*, the panel in this case thought the failure of the district court to make a specific finding that Ms. King would have faced substantial difficulties in obtaining counsel without a risk enhancement was of no real significance. *See King*, 906 F.2d at 768. The district court had instead relied on Ms. King's attorney affidavits and on a case in which a different district judge had made a blanket finding "that attorneys in the District would not accept contingent cases without some risk enhancement." *Id.* (citing *Mem. Op. II* at 2, 4 (citing *Palmer v. Schultz*, 679 F. Supp. 68 (D.D.C. 1988), *appeal dismissed*, No. 88-5108 (D.C. Cir. 1988))). The panel held that the cross-citation to the other district judge's finding in conjunction with the affidavits filed in the case was sufficient to satisfy *McKenzie's* reading of Justice O'Connor's opinion.

We decided to rehear the case *en banc in* order to reconsider the interpretation of *Delaware Valley II* that the panel in *McKenzie* adopted. It is our view that the approach followed by the majority in *McKenzie* is, as Judge Buckley argued, a misreading of Justice O'Connor's concurring opinion. Moreover, we do not think that Justice O'Connor's concurring opinion in *Delaware Valley II* controls the issue of the circumstances under which contingency enhancements are permitted. We conclude that the fragmented decision in *Delaware Valley II* provides no test for determining the availability, much less the calculation, of contingency enhancements under fee-shifting statutes and that we are therefore obliged to continue the search for the most sensible rule to govern contingency enhancements. The rule we adopt is that of

the *Delaware Valley II* plurality: a reasonable lodestar fee awarded under federal fee-shifting statutes may not be enhanced to compensate a prevailing party for his initial risk of loss.

II.

A.

Delaware Valley II has given rise to a spate of circuit court opinions that attempt—with varying degrees of confidence—to interpret the Supreme Court's position. *See, e.g., Rode v. Dellarciprete*, 892 F.2d 1177, 1184-85 (3d Cir. 1990); *Student Pub. Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1436, 1451 (3d Cir. 1988); *Blum v. Witco Chem. Corp.*, 829 F.2d 367, 379-82 (3d Cir. 1987); *Craig v. Secretary, Dep't of Health and Human Servs.*, 864 F.2d 324, 327-28 (4th Cir. 1989); *Spell v. McDaniel*, 824 F.2d 1380, 1403-05 (4th Cir. 1987); *cert. denied*, 484 U.S. 1027 (1988); *Leroy v. City of Houston*, 831 F.2d 576, 583-84 (5th Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988); *Skelton v. General Motors Corp.*, 860 F.2d 250, 254 (7th Cir. 1988); *Hendrickson v. Branstad*, 934 F.2d 158, 162-63 (8th Cir. 1991); *D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1384 (9th Cir. 1990); *Fadhl v. City of San Francisco*, 859 F.2d 649, 650-51 (9th Cir. 1988) (per curiam); *Smith v. Freeman*, 921 F.2d 1120, 1122-23 (10th Cir. 1990); *Wulf v. City of Wichita*, 883 F.2d 842, 876 (10th Cir. 1989); *Norman v. Housing Auth.*, 836 F.2d 1292, 1302 (11th Cir. 1988). We, like our sister courts of appeal, have struggled to take from the case a rule of law that defines the circumstances in which contingency enhancements may be awarded to the lawyers who represent prevailing plaintiffs under the myriad of federal fee-shifting statutes. *See McKenzie v. Kennickell*, 875 F.2d 330, 332-38 (D.C. Cir. 1989); *id.* at 340-43 (Buckley, J., dissenting); *Weisberg v. U.S. Dep't of Justice*, 848 F.2d 1265, 1272-73 (D.C. Cir. 1988); *Thompson v. Kennickell*, 836 F.2d 616, 621 (D.C. Cir. 1988); *Save Our*

Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43, 53 n.6 (D.C. Cir. 1987), *vacated on other grounds*, 857 F.2d 1516 (D.C. Cir. 1988) (en banc).

The Supreme Court's decisions on attorney's fees prior to *Delaware Valley II* had established the lodestar—a measure of fees defined by the number of hours reasonably expended on a case multiplied by a reasonable market rate per hour—as the presumptively reasonable award, steadily subsuming most other factors into that single calculation. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Blum v. Stenson*, 465 U.S. 886, 897-902 (1984); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564-66 (1986) (*Delaware Valley I*). Twice, however, the Supreme Court had specifically reserved the question whether the lodestar could ever be enhanced to reflect the risk of nonpayment assumed by an attorney accepting a case under a statute that authorized fees only to the prevailing party. *See Blum*, 465 U.S. at 901 n.17; *Delaware Valley I*, 478 U.S. at 568. *Delaware Valley II* attempted to resolve this issue.[2]

The judgment in *Delaware Valley II* reversed an award of a 100% contingency enhancement.[3] Justice White,

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[2] We do not understand how, as the dissent suggests, the discrete question presented in this case—whether a contingency enhancement is properly included within an award of attorney's fees—can possibly be thought a matter for the discretion of the trial judge. If the overall reasonableness of a statutory attorney's fee award were always a matter for the trial judge's discretion, unguided by a legal structure, the Supreme Court certainly has wasted a good deal of time and effort attempting to develop uniform rules. *See Blanchard v. Bergeron*, 489 U.S. 87 (1989); *Delaware Valley II*, 483 U.S. 711 (1987); *Delaware Valley I*, 478 U.S. 546 (1986); *Blum*, 465 U.S. 886 (1984); *Hensley*, 461 U.S. 424 (1983).

[3] *Delaware Valley II* interpreted the fee-shifting provision of the Clean Air Act, 42 U.S.C. § 7604(d). However, the Court has said that its standards for determining "reasonable" fees apply to all federal statutes awarding "reasonable" attorney's fees to a "prevailing party," including Title VII. *See Hensley*, 461 U.S. at 433 n.7.

writing for a plurality of four Justices, concluded in Part IV of his opinion that contingency enhancements under fee-shifting statutes are simply "impermissible." *Delaware Valley II*, 483 U.S. at 727 (plurality opinion). Nevertheless, the plurality went on in Part V to suggest that if contingency bonuses were to be made available at all, they "should be reserved for exceptional cases." *Id.* at 728. Four Justices in dissent would have allowed a contingency enhancement in any case in which "an attorney and client have been unable to mitigate the risk of nonpayment," *id.* at 749 (Blackmun, J., dissenting), as well as "additional enhancement" in those cases posing great " 'legal' risks." *Id.* at 751. Under the dissent's test, contingency enhancements would be "appropriate in most circumstances." *Id.* at 3741.

Justice O'Connor concurred in part and concurred in the judgment reversing the award. She agreed with the dissenters that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee." *Id.* at 731 (O'Connor, J., concurring in part and concurring in the judgment). But she joined in the plurality's judgment that the record before the Court did not justify a contingency enhancement. *See id.* at 734. She also agreed with the plurality that no enhancement could be awarded for the "legal" risks peculiar to the specific case. *See id.* at 731, 734. Finally, Justice O'Connor agreed with the statement in Part V of the plurality opinion "that no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.' " *Id.* at 733 (quoting plurality opinion at 731).

B.

In our prior opinions interpreting *Delaware Valley II*, we, like other circuit courts, have assumed that Justice O'Connor's concurrence controls. *See McKenzie v. Ken-*

nickell, 875 F.2d 330, 332-38 (D.C. Cir. 1989); *id.* at 340-43 (Buckley, J., dissenting); *Weisberg v. U.S. Dep't of Justice*, 848 F.2d 1265, 1272-73 (D.C. Cir. 1988); *Thompson v. Kennickell*, 836 F.2d 616, 621 (D.C. Cir. 1988); *Save Our Cumberland Mountains, Inc.* v. *Hodel*, 826 F.2d 43, 53 n.6 (D.C. Cir. 1987), *vacated on other grounds*, 857 F.2d 1516 (D.C. Cir. 1988) (en banc). But we have not focused on the fact that there are two analytically distinct questions involved in awarding a contingency enhancement. First, a court must decide whether an enhancement is available at all. Then, assuming an enhancement is warranted, the court must calculate its amount. Virtually all of Justice O'Connor's relatively brief opinion deals with the second question. But the question of *availability* of enhancements logically precedes the question of their *calculation*.

To ascertain when contingency enhancements should be made available under *Delaware Valley II*, we have looked for some common ground between Justice O'Connor's concurrence and the plurality opinion. We have had little difficulty placing a *label* on that common ground, since Justice O'Connor expressly joined the plurality's statement in Part V that enhancements should be available only when a plaintiff would have faced "substantial difficulties" in attracting counsel to his case without the prospect of an enhancement. However, we and the other courts of appeals have had considerable trouble determining the *content* of that "substantial difficulties" label —that is, determining just how "substantial" the "difficulties" in attracting counsel have to be, and how they must be proven.

In this search for content, several of our sister circuits have read Justice O'Connor's concurrence as implicitly agreeing with the plurality's statement, *Delaware Valley II*, 483 U.S. at 727 (plurality opinion), that contingency bonuses should be available only in "exceptional cases." *See, e.g., Student Pub. Interest Research Group*

v. AT & T Bell Laboratories, 842 F.2d 1436, 1451-52 (3d Cir. 1988) ("[C]ontingency multipliers should be granted only rarely."); *Norman v. Housing Auth.*, 836 F.2d 1292, 1302 (11th Cir. 1988) ("[I]n the rare case enhancement may be appropriate . . . ."). Appellant presses this position upon us here. And in *Thompson v. Kennickell*, we made a similar suggestion, describing *Delaware Valley II* in Gilbert and Sullivan terms: "What, never? No, never!" for the plurality, and "What, *never*? Hardly ever!" for Justice O'Connor. *Thompson*, 836 F. 2d at 621 (emphasis in original).

To be sure, Justice O'Connor does not say at any point that she disagrees with the plurality's "exceptional cases" position. And she does endorse the plurality's view that the lodestar is a presumptively adequate fee. *See Delaware Valley II*, 483 U.S. at 733-34 (O'Connor, J., concurring in part and concurring in the judgment). Moreover, Justice O'Connor joined the reversal of the award of a contingency enhancement *without a remand*, notwithstanding the dissenters' powerful argument that the applicant should be given an opportunity to develop the record to meet the Supreme Court's standard. *See id.* at 754-55 (Blackmun, J., dissenting); *cf. Thompson*, 836 F.2d at 621 (remanding for application of *Delaware Valley II*). This at least suggests that Justice O'Connor believed that contingency enhancements should be available only in those presumably rare situations in which the need was readily apparent. Still, she did not join Part V of the plurality opinion, so we cannot be sure that she accepted the "exceptional cases" limitation.

There is only one point concerning the availability of contingency enhancements that a fair reading of Justice O'Connor's concurrence clearly supports. This point is that evidence of *actual* difficulties is highly probative of the "substantial difficulties" *Delaware Valley II describes.* In adopting the plurality's "substantial difficulties" test, Justice O'Connor quotes from Part V of the plurality

opinion. The passage she quotes concludes with a footnote that we presume Justice O'Connor adopted along with the textual language she cited. The footnote states: " 'an attorney's fee award should be only as large as necessary to attract competent counsel,' and '*one relevant factor bearing on high-risk is whether other counsel had declined to take the case because there was little or no prospect of earning a fee.*' " *Id.* at 731 n.12 (plurality opinion) (quoting *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986)) (emphasis added). And, as Judge Buckley noted in *McKenzie*, "Justice O'Connor joined the plurality in requiring proof that *the prevailing party* 'would have faced substantial difficulties' obtaining competent counsel 'in the relevant market,' absent an upward fee adjustment for contingency risks." *McKenzie*, 875 F.2d at 340-41 (Buckley, J., concurring in part and dissenting in part) (quoting *Delaware Valley II*, 483 U.S. at 733 (O'Connor, J., concurring in part and concurring in the judgment)) (emphasis in original). We thus believe that five Justices envisioned a particularized factual inquiry into the plaintiff's *actual* difficulties in retaining counsel—the kind of inquiry that Judge Buckley thought necessary but the majority in *McKenzie* eschewed. *But see Morris v. American Nat'l Can Corp.*, Nos. 90-1235, 90-2289, 1991 WL 15315, *5 (8th Cir. Aug. 14, 1991) (stating no actual difficulties need be shown) (citing *McKenzie*, 875 F.2d at 337).

This is, we recognize, a hard standard to meet. Indeed, if evidence that other counsel actually refused the case is only "one relevant factor" in determining whether the plaintiff would have had "substantial difficulties" in obtaining counsel without a risk enhancement—a factor insufficient by itself to justify awarding an enhancement —the plaintiff's burden in producing sufficient evidence to meet the test must be quite daunting. And it also follows that a plaintiff's failure to put on *any* evidence of actual difficulties in attracting counsel without extra compensa-

tion would severely undermine a claim for a contingency enhancement.

The district court here made no finding that Ms. King would have faced substantial difficulties in attracting counsel without a contingency bonus. Nor was there any evidence that Ms. King faced actual difficulties in securing representation. As it happened, Robert Adler was the first attorney the plaintiff contacted, and, although he later stated that he would not have accepted representation without the "definite possibility" of a contingency enhancement, his fee award in a previous case had been enhanced by only 10%. Given the uncertain state of the law at the time he took this case (which is not to say that it is particularly clear today) and his previous experience, the "definite possibility" to which he referred does not seem very weighty. In his engagement letter to Ms. King, Mr. Adler referred only to charging his "hourly rates" and stated that he would "seek an award of attorneys' fees from the defendants *with respect to those amounts*, should we be the prevailing party." Joint Appendix (J.A.) at 73a (emphasis added). It does not seem to us that Mr. Adler's testimony goes very far to meet the plaintiff's burden under the "substantial difficulties" test.

Before the district court and again before us, Ms. King has also sought to rely on the affidavits of attorneys who were not approached by Ms. King and were never involved in the case.[4] These affidavits—some from Title VII prac-

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[4] Of these numerous affidavits, only five addressed the facts of Ms. King's particular case or expressed any opinion at all about whether Ms. King herself would have faced substantial difficulties in attracting competent counsel absent the availability of a contingency enhancement. Two of these described the weakness and difficulty of her case as the principal reason the affiants would have been unwilling to assume representation. *See* J.A. at 112d (Cashdan); 173b (Fitzpatrick). Another attorney allowed that his firm would possibly have represented Ms. King if she had an "exceptionally strong claim." J.A. at 124b (Chuzi). The fourth admitted there was at least a possibility, although "remote," of finding

titioners, some from practitioners from other areas—contend that lawyers would not take cases on a non-fee-paying basis without contingency enhancements. We do not think that we can accept such evidence as meeting the substantial difficulties test. Without in any way denigrating the *bona fides* of these lawyers, we cannot blink the fact that they are obviously self-interested. We think it is indisputable that if such evidence were treated as determinative, or even weighty, the substantial difficulties test would be met so easily as to become a mere formality. The Supreme Court has itself recently disparaged such anecdotal evidence from attorneys unconnected with the case in the context of attorney's fees disputes. *See United States Dep't of Labor v. Triplett*, 110 S.Ct. 1428, 1433-34 (1990) (holding such evidence to be "blatantly insufficient" to raise a constitutional doubt about federal limits on attorney's fees, "even if entirely unrebutted").

Nor do we believe the few affidavits presented that expressed a view as to whether the affiant lawyer would or would not have taken Ms. King's case add much to her claim for an enhancement. Insofar as they seek to hypothesize whether the affiants would have taken her case, they focus (inevitably it seems to us) on the strength or weakness of her claim. *See supra* note 3. But in *Delaware Valley II*, it will be recalled, both the plurality and Justice O'Connor regarded that factor as inappropriate. *See Delaware Valley II*, 483 U.S. at 726 (plurality opinion); *id.* at 734 (O'Connor, J., concurring in part and concurring in the judgment).

In sum, even if we were to apply Justice O'Connor's concurrence as the holding of *Delaware Valley II*, we think Ms. King's evidence does not paint a picture of a situation where a contingency enhancement is necessary

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pro bono representation for Ms. King. *See* J.A. at 214 (Lapidus). Only a single affidavit stated flatly that the affiant would not take Ms. King's case because of the unavailability of contingency enhancements. *See* J.A. at 177 (Gottfried).

to "mak[e] it possible for poor clients with good claims to secure competent help." *Id.* at 730-31.

C.

Although we have determined that Ms. King failed to carry her burden under Justice O'Connor's opinion in *Delaware Valley II*, candor obliges us to concede that we are unable to set forth a conceptual framework that would govern further litigation on the subject of contingency enhancements. We have certainly suggested, in accordance with our understanding of the substantial difficulties test, that actual evidence that attorneys did refuse a case is of greater probative value than the hypothetical testimony of non-involved and self-interested lawyers. But we are sorely troubled by, and indeed we have no answer to, the *McKenzie* majority's argument that focusing on actual difficulties will encourage "a charade in which clients seeking representation under fee shifting statutes would be steered to several attorneys whose pre-arranged role it would be to 'refuse' the case, knowing that such refusals were necessary to permit the eventual award of fees." *McKenzie*, 875 F.2d at 337. We think the *McKenzie* majority was also correct in suggesting that emphasizing the actual difficulties a plaintiff had in obtaining counsel will create perverse incentives by discouraging those very "reference services . . . that make it easier for litigants to find legal representation." *Id.*

To add to our quandary, even if we did have evidence that several lawyers had declined Ms. King's case, we think it would be impossible to separate out from their decision not to represent her the strength or weakness of her claim as it appeared to them at the time. After all, this is surely the principal reason a lawyer will turn down a case under a fee-shifting statute. *Delaware Valley II*, however, tells us unequivocally that the risk of loss in a particular case is not a factor that courts may look at in determining whether a contingency enhancement is appropriate. "[A] court should not award any enhance-

ment based on 'legal' risks or risks peculiar to the case." *Delaware Valley II*, 483 U.S. at 734 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 726-27 (plurality opinion).[5] If the courts cannot do so directly, how can it be appropriate to do so vicariously through the eyes of lawyers who declined the case?

The more we struggle with this problem, the more we are convinced that it is virtually impossible to determine whether a given plaintiff would have had "substantial difficulties" in obtaining counsel without a contingency enhancement. The inquiry is quite artificial, because, by definition, the plaintiff stands before the court with counsel. And since counsel could not possibly know whether a risk enhancement was in the offing until a court decides the question years later, our inquiry is circular. As Judge Williams noted in his concurrence in the panel opinion in this case, whether a plaintiff *would have* faced substantial difficulties absent the possibility of a contingency enhancement is essentially unknowable when the most critical assumption necessary to make such a counterfactual judgment is itself the issue before the court. *See King*, 906 F.2d at 770 (Williams, J., concurring) ("I view causation as running in the opposite direction from that supposed by the controlling precedents: I see the judicial judgment as defining the market, not vice versa.").

As Judge Buckley correctly observed in *McKenzie*, if Justice O'Connor's opinion controls the holding of *Delaware Valley II*, we would be obliged to apply the "substantial difficulties" test, notwithstanding these analytical difficulties, "like it or not." *McKenzie*, 875 F.2d at 342 (Buckley, J., concurring in part and dissenting in part).

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[5] The dissent, nevertheless, would calculate the amount of contingency enhancement based on the degree of risk faced by the plaintiff's lawyer in *each case*. As the plurality in *Delaware Valley II* noted, that approach would provide incentives to bring the weakest cases to court, and it would put the district judge who had to make that determination in a difficult psychological posture. *See Delaware Valley II*, 483 U.S. at 722; id. at 725 (plurality opinion).

But the difficulties we have described have prompted us to think harder about what the controlling principles of *Delaware Valley II* really are; specifically, we have reconsidered whether we have been correct in assuming that Justice O'Connor's concurring opinion governs the subject of contingency enhancements. We have regarded her concurrence as controlling largely in reliance on the Supreme Court's admonition in *Marks v. United States*, 430 U.S. 188 (1977), that when the Court issues fragmented opinions, the opinion of the Justices concurring in the judgment on the " 'narrowest grounds' " should be regarded as the Court's holding. *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). But *Marks* is workable—one opinion can be meaningfully regarded as "narrower" than another—only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), for example, the Court interpreted its earlier nine-way split in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). In *Furman*, the five Justices who supported the judgment that Georgia's death penalty statute was unconstitutional produced five separate opinions. Two Justices concluded that the death penalty was unconstitutional in all circumstances. *See id.* at 305-06 (Brennan, J., concurring); *id.* at 370-71 (Marshall, J., concurring). Three others found specific defects in the Georgia statute but declined to decide whether capital punishment might be constitutional under other circumstances. Of these, Justices Stewart and White felt that the Georgia death penalty was unconstitutional because it was applied in an arbitrary and capricious manner, *see id.* at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring), while Justice Douglas stated that it was unconstitutional be-

cause it was "pregnant with discrimination," falling more harshly on minorities and the poor both because its application was discretionary rather than mandatory and because wealthy defendants could afford better counsel. *See id.* at 255-57 (Douglas, J., concurring).

In *Gregg*, the Court— in another fragmented opinion— treated the opinions of Justices Stewart and White as controlling. *See Gregg*, 428 U.S. at 169 n.15 (plurality opinion). Justices Marshall and Brennan, who believed the death penalty unconstitutional in all circumstances, surely agreed with Justices Stewart and White that it was unconstitutional when administered in an arbitrary and capricious manner. By the same token, Justice Douglas, who insisted that any discretion in the judge or jury to decide when to impose capital punishment rendered the arrangement unconstitutional, would certainly have subscribed to Justice Stewart's notion that the death penalty could not be administered constitutionally to "a capriciously selected random handful" of criminals. *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring). Selecting the opinions of Justices Stewart and White as the holding of *Furman* in *Gregg* was thus unproblematic.

Similarly, in *Marks* itself, the Court adopted as the governing definition of obscenity the position of the plurality from the earlier case of *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 (1966) (*Fanny Hill*). In *Fanny Hill*, three separate views supported the judgment that the book was not obscene: the view expressed in the plurality opinion, which said that a book had to be "utterly without redeeming social value" to be considered obscene, *see id.* at 419 (opinion of Brennan and Fortas, JJ., and Warren, C.J.) (emphasis omitted); the view of Justice Stewart that only "hardcore" pornography could be banned as obscene, *see id.* at 421 (opinion of Stewart, J.); and the view of Justices Black and Douglas, who believed that obscenity could never be banned. *See id.* at

421 (opinion of Black, J.); *id.* at 433 (opinion of Douglas, J.). Because Justices Black and Douglas had to agree, as a logical consequence of their own position, with the plurality's view that anything with redeeming social value is not obscene, the plurality of three in effect spoke for five Justices: *Marks*' "narrowest grounds" approach yielded a logical result.[6]

When, however, one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.

The Court itself appears not to apply *Marks* in cases of this type. To take one example, in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), a plurality of four Justices held that only when evidence was discovered "inadvertently" could it be seized pursuant to the plain view exception to the Fourth Amendment's warrant requirement. *See id.* at 469 (plurality opinion). Four other Justices believed that inadvertence was not necessary for a valid seizure of evidence in plain view. *See id.* at 492 (Burger, C.J., concurring in part and dissenting in part); *id.* at 506 (Black, J., concurring in part and dissenting in part); *id.* at 510 (Blackmun, J., concurring in part and dissenting in part); *id.* at 516 (White, J., concurring in part and dissenting in part). Justice Harlan concurred in the judgment that the search in question was unconstitutional but provided no reasoning by which one could discern his position on the inadvertence requirement. *See*

[6] Justice Stewart's "hardcore" test, though it was also a logical subset of Justice Black and Douglas' opinion, would only have spoken for three Justices and could therefore not have been the controlling rationale.

id. at 490 (Harlan, J., concurring in the judgment). The Court subsequently stated that the inadvertence requirement was "not a binding precedent" and was merely "the considered opinion of four Members of this Court" that should be "the point of reference for further discussion of the issue." *Texas v. Brown*, 460 U.S. 730, 737 (1983) (plurality opinion). The Court eventually disavowed the inadvertence requirement entirely. *See Horton v. California*, 110 S. Ct. 2301, 2308-10 (1990).

It seems to us that Delaware Valley II is one of the fragmented opinion cases that cannot be resolved satisfactorily by *Marks*. Unlike *Furman* or *Fanny Hill*, *Delaware Valley II* is not a case in which the concurrence posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own, broader position. In other words, it is not a case in which there is an implicit majority of the Court. Rather, *Delaware Valley II* involves three distinct approaches to the issue of contingency enhancements in fee-shifting statutes, none of which enjoys the support of five Justices.

Superficially, to be sure, there is a common link between the plurality opinion and Justice O'Connor's concurrence; both Part V of the plurality opinion and Justice O'Connor seem to endorse the substantial difficulties test we sought to apply earlier in this opinion. But the plurality quite clearly indicated in Part IV that it did not believe that contingency enhancements were ever available. *See Delaware Valley II*, 483 U.S. at 727 (plurality opinion). Therefore, Part V appears to have been composed not as an alternative holding but rather as a fallback position, an invitation, as it were, to Justice O'Connor to reach common ground. Since Justice O'Connor did not accept the plurality's invitation, explicitly declining to join Part V, the plurality's true position remains that expressed in Part IV.

Justice O'Connor does appear to accept the bare concept that contingency enhancements should not be awarded

unless the plaintiff shows substantial difficulties, but it is far from clear, as we noted earlier, what content she would give to the "substantial difficulties" test the plurality articulates in Part V. Her concurrence does not contain enough independent reasoning on the question of availability to allow us to compare her position analytically to that of the plurality. In that sense, her opinion on that issue approaches Justice Harlan's in *Coolidge*.

Even if it were possible to determine from Justice O'Connor's opinion *when* to apply a contingency enhancement and to conclude that her views on that subject were somehow narrower than the plurality's, it is quite clear that one could not say in the *Marks* sense that her carefully explained view of *how* the contingency enhancement should be calculated is narrower than the plurality's answer to that question. The plurality in Part IV stated that if an upward adjustment for contingency risk were applied, the amount should be based on the "real risk-of-not-prevailing" in the case—but as a general rule should be "no more than one-third of the lodestar." *Id.* at 730. Justice O'Connor, on the other hand, takes a different approach altogether, one that does not vary with the riskiness of the individual case but rather is based on a class determination of the amount of contingency enhancement usually paid in the relevant market, with no explicit ceiling. *See id.* at 731-34 (O'Connor, J., concurring in part and concurring in the judgment). We do not see how either approach can be thought "narrower" than the other; they are simply different.

To apply *Marks* to *Delaware Valley II*, we would have to conclude that Justice O'Connor's answers to both the "when" and the "how" questions were "narrower" than the plurality's in Part V. Without implicit agreement on both, it is simply impossible to regard the substantial difficulties test as controlling. Of course, as we have recognized, how one calculates a contingency enhancement could be thought to be a separate analytic issue from the

question whether and under what circumstances a contingency enhancement is available. But as the panel opinion and other cases demonstrate, the two questions tend to run together. *See King*, 906 F.2d at 765-68; *McKenzie* 875 F.2d at 334-37; *Student Pub. Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1436, 1451 (3d Cir. 1988). It is very difficult to consider the circumstances under which a contingency enhancement is "necessary" to attract counsel without contemplating the amount of the enhancement; each part of the inquiry has inevitable ramifications for the other. This may be the reason Justice O'Connor's opinion focuses so heavily on the "how" question. Because her answer to that question is so clearly at odds with that of the plurality, however, we are left without a controlling opinion or a governing test for awarding contingency enhancements under *Delaware Valley II*.

The Third Circuit, taking a different approach, has reasoned that Justice O'Connor's opinion can be regarded as a subset of the dissent if not the plurality. As such, Justice O'Connor's concurrence would speak for a majority of the Court. *See id.* ("Because the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the Court."). The Third Circuit appears to apply the *Marks* methodology to reach this result, but it does not explicitly rely on *Marks*. *See id.* at 1451 n.16 (citing *Marks* as a "see also" in a footnote appended to the citation of a circuit opinion). This is understandable, because *Marks* has never been so applied by the Supreme Court, and we do not think we are free to combine a dissent with a concurrence to form a *Marks* majority. As the Court said in *Marks* itself, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by *those members who concurred in the judgments* on the narrowest grounds.'" *Marks*, 430 U.S. at 193

(quoting *Gregg*, 428 U.S. at 169 n.15 (opinion of Stewart, Powell, and Stevens, JJ.)).

To be sure, in *Vasquez v. Hillery*, 474 U.S. 254 (1986), the Supreme Court, in interpreting *Rose v. Mitchell*, 443 U.S. 545 (1979), emphasized that an opinion that combines shifting majorities in various portions is no less binding than would be an opinion in which the same Justices formed the majority for all the sections. *See Vasquez*, 474 U.S. at 261-62 n.4; *see also Arizona v. Fulminante*, 111 S. Ct. 1246 (1991) (employing two distinct majorities to arrive at a judgment, both of which therefore constitute binding law). That, however, is quite a different situation than the one that the *Marks* methodology addresses, where there is no explicit majority agreement on all the analytically necessary portions of a Supreme Court opinion. Under these latter circumstances, if the application of *Marks* will not yield a majority holding, nothing will.[7]

To say that *Delaware Valley II* provides no controlling legal holding is not to say that it has no binding impact on us. Because the Court's result was to deny a contingency enhancement without even a remand, we think we could not authorize the routine awarding of contingency enhancements of whatever size. *Cf. National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting) (noting that the result is binding even when the Court fails to agree on reasoning). We furthermore believe, as this opinion and the dissent

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[7] In our view, even applying the Third Circuit's reasoning, we do not think Justice O'Connor's concurrence constitutes a controlling opinion in *Delaware Valley II*. For similar reasons to those we outlined in our discussion as to whether her opinion could be thought narrower than the plurality opinion, Justice O'Connor's thoughtful answer to the question of how to calculate a contingency enhancement should it be available cannot possibly be thought a subset of the dissent's approach to the same issue. She herself recognizes this. *See Delaware Valley II*, 483 U.S. at 732 (O'Connor, J., concurring in part and concurring in the judgment).

make clear, that there simply is no practical middle ground between providing enhancements routinely and not providing them at all. Keeping in mind that a majority of the Supreme Court clearly agrees that the question of attorney's fees must not turn into major litigation in itself, *see Delaware Valley II*, 483 U.S. at 722, we think the appropriate course is to hold that contingency enhancements will not be available in this Circuit.[8] We note that although other circuit courts have set forth various tests for awarding contingency enhancements under *Delaware Valley II*, most of the tests appear to be difficult, if not impossible, to meet in practice. *See, e.g., Student Pub. Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1436, 1451-52 (3d Cir. 1988) ("[C]ontingency multipliers should be granted only rarely."); *Craig v. Secretary, Dep't of Health and Human Servs.*, 864 F.2d 324, 327 (4th Cir. 1989) (no contingency enhancement available "in the absence of exceptional circumstances"); *Leroy v. City of Houston*, 831 F.2d 576, 583 (5th Cir. 1987) (contingency enhancements should be "reserved for 'exceptional cases'" (citation omitted)); *Skelton v. General Motors Corp.*, 860 F.2d 250, 254 (7th Cir. 1988) (contingency enhancements available only if plaintiffs meet "stringent requirements"); *Hendrickson v. Branstad*, 934 F.2d 158, 162 (8th Cir. 1991) ("[E]nhancement is reserved for 'rare' and 'exceptional' cases . . . ."); *Smith v. Freeman*, 921

[8] The dissent's reliance on the legislative history of 42 U.S.C. § 1988—particularly citations to *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)—comes too late. The Supreme Court has, on several occasions, indicated that it does not regard factors listed separately in *Johnson* as appropriate enhancements to the lodestar. *See Blum v. Stenson*, 465 U.S. 886, 898-99 (1984); *Delaware Valley I*, 478 U.S. 546, 564, 566 (1986). And the dissent's citation of *Blanchard v. Bergeron*, 489 U.S. 87 (1989), is also misplaced. There the Supreme Court was dealing with an entirely different issue—the question whether an actual, private contingency fee arrangement limited a statutory award, not whether a contingency factor should be added to the lodestar.

F.2d 1120, 1123 (10th Cir. 1990) (quoting plurality's view that "enhancement for the risk of nonpayment should be reserved for exceptional cases"); *Norman v. Housing Auth.*, 836 F.2d 1292, 1302 (11th Cir. 1988) ("[I]n the rare case enhancement may be appropriate . . . ."). *But cf. D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1383 (9th Cir. 1990) (implying that routine contingency enhancements might be justified).

We have done our best to apply *Delaware Valley II* but have been unable to derive a governing rule from the opinion. Considering our struggle to understand and apply *Delaware Valley II* as well as the difficulties our sister circuits have experienced, we urge the Supreme Court to clarify its position.

* * * *

For the foregoing reasons, we overrule *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989), and those portions of our other previous opinions inconsistent with our current disposition, and reverse the contingency enhancement portion of the attorney's fees allowed to apellant.

It is so ordered.

EDWARDS, *Circuit Judge*, with whom MIKVA, *Chief Judge*, WALD and RUTH B. GINSBURG, *Circuit Judges*, join, *dissenting*: In deciding this appeal, we are constrained to apply a specific statutory provision, section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1988), under which the District Court has broad authority to assess the reasonableness of a fee request. In the absence of legal error, the trial judge's determination as to reasonableness may not be disturbed unless it is an *abuse of discretion*. Given this highly deferential standard of review, there is no legitimate basis whatsoever for this court to overturn the judgment of the trial judge on the facts of this case.

Furthermore, the majority's new rule, that contingency awards are never justified, is completely without foundation. Twelve other circuits have reviewed the question at hand, and not one other circuit has adopted a rule that completely bars contingency enhancements.

The plaintiff, Mable King, was awarded an attorney's fee pursuant to section 706(k), which reads, in pertinent part, as follows:

> In any action or proceeding under this subchapter the court, *in its discretion*, may allow the prevailing party . . . *a reasonable attorney's fee* as part of the costs [of bringing the action] . . . .

42 U.S.C. § 2000e-5(k) (1988) (emphasis added). As may be seen from the clear terms of the statute, the "district court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness." *Blum v. Stenson*, 465 U.S. 886, 902 n.19 (1984). The Supreme Court has *emphasized* that it is entirely "appropriate" that the trial judge have broad authority in determining the amount of a fee award "in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual

matters." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).[1]

In this case, the District Court awarded an attorney's fee that compensates Ms. King's counsel for the risk of having taken the case on a contingent-fee basis. In reaching its conclusion that a 50% enhancement over normal hourly rates was "reasonable" compensation in this case, the District Court properly looked to evidence of prevailing market practices to ensure that the fee award was roughly commensurable with what counsel could obtain on the open market. There is no doubt, given the language of the statute, that the District Court's judgment in this regard is to be reviewed under a highly deferential, abuse-of-discretion standard. *See Blum*, 465 U.S. at 896; *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 569 (1986) ("*Delaware Valley I*") (Blackmun, J., concurring in part and dissenting in part); *City of Riverside v. Rivera*, 477 U.S. 561, 586 (1986) (Powell, J., concurring in the judgment). Under this standard of review, we are not to substitute our judgment of what is "reasonable" for that of the District Court; rather, we are to review the trial court's judgment only to ensure that it is not founded upon an error of law or a clearly erroneous finding of fact and that there is some evidence in the record upon which the court "rationally could have based its decision." *Heat & Control, Inc. v. Hester Indus., Inc.*, 785 F.2d

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[1] *See also Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989) ("It is central to the awarding of attorney's fees . . . that the district court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case.").

Although some of these precedents focus upon the parallel fee-shifting provision set out in the Civil Rights Attorney's Fee Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, *codified at* 42 U.S.C. § 1988 (1988), Congress and the Supreme Court have made clear that the fee-shifting provisions of that statute and Title VII are to be interpreted alike. *See Hensley*, 461 U.S. at 433 n.7; S. REP. No. 1011, 94th Cong., 2d Sess. 4 (1976).

1017, 1022 (Fed. Cir. 1986); *see also Founding Church of Scientology of Washington, D.C., Inc. v. Webster*, 802 F.2d 1448, 1457 (D.C. Cir. 1986) ("The abuse-of-discretion standard calls on the appellate department, in a spirit of humility occasioned by not having participated in what has gone before, not just to scrutinize the conclusion but to examine with care and respect the process that led up to it."), *cert. denied*, 484 U.S. 871 (1987); *Gomez v. Chody*, 867 F.2d 395, 405 (7th Cir. 1989) ("'To find an abuse of discretion, we must conclude that "no reasonable [person] . . . could agree with the district court."'") (quoting *Mumford v. Bowen*, 814 F.2d 328, 329 (7th Cir. 1986)).

Notwithstanding the latitude vested by Congress in trial courts to craft "reasonable" fee awards, the District of Columbia ("Government") defendants in this case urge this court to substitute its judgment for that of the trial judge in overturning the award of fees. In following this suggestion, the majority seizes upon the "substantial difficulties" test found in *Pennsylvania v. Delaware Valley Citizens' Council for Clear Air*, 483 U.S. 711, 731 (1987) ("*Delaware Valley II*"); *id.* at 733 (O'Connor, J., concurring in part and concurring in the judgment), which purports to measure risk enhancement pursuant to prevailing "market" rates in the relevant legal community. The majority, however, turns the test on its head by converting it to a test whereby an individual plaintiff must establish that she personally encountered difficulty securing competent representation without the promise of a contingency enhancement. The problem with this result, however, is that it defies the premise upon which it is based. If there is a "substantial difficulties" requirement under section 706(k), it does *not* seek to determine whether a particular plaintiff "actually faced substantial difficulty in retaining counsel." *Morris v. American Nat'l Can Corp.*, 941 F.2d 710, 715 (8th Cir. 1991) (citing *McKenzie v. Kennickell*, 875 F.2d 330, 337-38 (D.C. Cir.

1989); *see* 875 F.2d at 338 ("Justice O'Connor's opinion instructs us to adopt a class-wide view of contingent cases; if the unavailability of risk enhancements would have caused plaintiffs to have experienced 'substantial difficulty' in locating counsel, then, notwithstanding the particular circumstances of their case, such an enhancement may be granted.")). Therefore, the trial judge surely did not abuse his discretion in failing to apply the majority's distorted construction of the so-called "substantial difficulties" test. There is no "actual difficulties" requirement under section 706(k), and this court has no authority to amend the statute to include such a restriction.

Just recently, in rejecting a claim for expert fees as a part of a claim for attorney's fees, the Supreme Court reminded us that we must enforce fee statutes as written. On this point, Justice Scalia, borrowing a well-known passage from an opinion by Justice Brandeis, said:

> [The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

West Va. Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138, 1148 (1991) (quoting *Iselin v. United States*, 270 U.S. 245, 250-51 (1926)). In first utilizing an actual difficulties gloss to section 706(k), and then completely barring contingency enhancements, the majority opinion in this case "transcends the judicial function." Because there is nothing in the statute or the relevant Supreme Court case law that would support the majority's conclusion, we dissent.

I.

By now, it should be beyond dispute that the fee-shifting provision of Title VII permits district courts to

enhance time-based fee awards to take account of the fact that an attorney has taken a case on a contingent-fee basis. It is, of course, true that, in determining what is "a reasonable attorney's fee" in any given case, the trial judge normally begins by calculating the prevailing attorney's so-called "lodestar" fee. As the Supreme Court has explained:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make *an initial estimate* of the value of a lawyer's services.

Hensley, 461 U.S. at 433 (emphasis added). This calculation, however, is only a "starting point" and "does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward . . . ." *Id.* at 434; *see also Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989); *Blum*, 465 U.S. at 888 ("[a]djustments to that [lodestar] fee then may be made as necessary in the particular case").

Among these "other considerations," it appears quite certain that Congress intended that the courts would take into account whether a lawyer had taken a case on a fixed- or contingent-fee basis. This can be inferred from Congress' approving citation of a 1974 Fifth Circuit decision, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which included the contingent nature of payment among 12 factors that trial courts should consider in calculating fee awards. *See* S. REP. No. 1011, 94th Cong., 2d Sess. 6 (1976); H.R. REP. No. 1558, 94th Cong., 2d Sess. 8-9 (1976); *see also Blum*, 465, U.S. at 902-03 (Brennan, J., concurring) (Congress' approval of *Johnson* and related cases makes it "clear . . . that Congress authorized district courts to award upward adjustments to compensate for the contingent nature of success"). "*Johnson's* 'list of 12,'" the Supreme Court

has often observed, "provides a useful catalog of the many factors to be considered in assessing the reasonableness of an award of attorney's fees . . . ." *Blanchard*, 489 U.S. at 93; *see also Hensley*, 461 U.S. at 429-30, 434 n.9 (looking to Fifth Circuit's *Johnson* opinion in determining congressional intent with regard to fee awards); *Blum*, 465 U.S. at 893-95 (same); *id.* at 902-03 (Brennan, J., concurring) (same).

Apart from these indications of congressional intent, the Supreme Court also has acknowledged the propriety of considering the uncertainty of payment in calculating a fee award. Five Justices undoubtedly agreed in *Delaware Valley II* that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under fee-shifting provisions" such as that found in Title VII. 483 U.S. at 731 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 739 (Blackmun, J., dissenting, joined by Brennan, Marshall & Stevens, JJ.) ("Congress envisioned that district courts would take the fact of contingency into account when calculating a reasonable attorney's fee"). Two years later, in *Blanchard*, the Court held that, while a plaintiff's contingent-fee contract with her attorney is by no means dispositive of a subsequent judicial assessment of "a reasonable attorney's fee" in a case, "[t]he *Johnson* contingency-fee factor *is* . . . a factor." 489 U.S. at 93 (emphasis added).

Moreover, perhaps the one rule that has emerged more clearly than any other from the Supreme Court's pronouncements in this area is that court-ordered attorney's fees are to reflect prevailing market rates and practices. *See, e.g., Missouri v. Jenkins*, 491 U.S. 274, 283 (1989) ("Our cases have repeatedly stressed that attorney's fees awarded [by a court] . . . are to be based on market rates for the services rendered."); *Blum*, 465 U.S. at 895 ("The statute and legislative history establish that 'reasonable fees' . . . are to be calculated according to the

prevailing market rates in the relevant community . . . ."); *Delaware Valley II*, 483 U.S. at 733 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 754 (Blackmun, J., dissenting). In this way, court-ordered fees will track market forces, fulfilling the congressional purpose of ensuring that attorneys will be available to prosecute Title VII cases and vindicate the fundamental national policies embodied in that statute. *See Jenkins*, 491 U.S. at 283 n.6; *Blum*, 465 U.S. at 903-04 (Brennan, J., concurring); *Hensley*, 461 U.S. at 447 (Brennan, J., concurring in part and dissenting in part).

There should be no controversy in the observation that attorneys in the private legal-services market ordinarily demand somewhat greater compensation in exchange for taking a case on a contingent-fee basis. It appears indisputable that "[l]awyers operating in the marketplace can be expected to charge a higher hourly rate when their compensation is contingent on success than when they will be promptly paid[] irrespective of whether they win or lose." *Blum*, 465 U.S. at 903 (Brennan, J., concurring); *see also* Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281, 324-25 (1977) ("The experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk."). Thus, commentators and courts have long and widely agreed that, in assessing the fair market value of legal services, both inside and outside the court-ordered fee context, some enhancement is required to compensate for the attorney's assumption of risk in a contingent-fee case. *See, e.g., Copeland v. Marshall*, 641 F.2d 880, 892-93 (D.C. Cir. 1980) (*en banc*); *id.* at 927 (Wilkey, J., dissenting); *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 188 (D.C. Cir. 1974) (adopting *Johnson's* "list of 12"); 2 M. DERFNER & A. WOLF, COURT ORDERED ATTORNEY FEES ¶ 15.01[2][c], at 15-16 (rev. ed. 1990) ("Most courts realize that where payment of a fee is contingent on success an attorney should receive a larger

overall fee than where payment is guaranteed regardless of outcome . . . .") (footnote omitted); *id.*, ¶ 16.04[4]; S. SPEISER, ATTORNEYS' FEES § 8:10, at 319 (1973) ("The fact that an attorney's employment is undertaken on a contingent basis is a proper factor to be considered in assessing a reasonable compensation for his services, the courts generally taking the view that a larger fee will be authorized where its payment depends upon the attorney's success than where he is to be paid whether or not his efforts are successful.") (footnote omitted); Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 501 (1981); Berger, *supra*, at 324-26.

Furthermore, it is absolutely clear that the lodestar is not the sole measure of a reasonable attorney's fee. It is true that the Supreme Court has said that "many of the *Johnson* factors," such as " 'novelty [and] complexity of the issues,' 'the special skill and experience of counsel,' the 'quality of representation,' and the 'results obtained' from the litigation[,] are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award," *see Delaware Valley I*, 478 U.S. at 565 (quoting *Blum*, 465 U.S. at 898-900); but, in making this observation, the Court has excluded the consideration of "enhancement of the lodestar[] based on the likelihood of success[] or . . . the risk of loss" from any presumption that the lodestar represents a reasonable fee, *id.* at 568.[2] Indeed, in *Delaware Valley I*, the Court reserved until *Delaware Valley II* the question of when and to what extent contingency enhancements might be awarded. As indicated earlier, a majority of the Court in *Delaware Valley II*

[2] The Court reiterated the presumptive reasonableness of the lodestar fee in *Blanchard*, but did so there only to rebut the suggestion that a fee arrangement set in a contingent-fee contract should govern as a strict ceiling on a court-ordered fee in the same case. *See* 489 U.S. at 95.

agreed that contingency enhancements may be awarded as a part of a reasonable attorney's fee. In other words, a majority of the Court in *Delaware Valley II* declined to apply any "presumption" that the lodestar normally represents a reasonable fee so as to defeat claims of enhancement based on the likelihood-of-success risk-of-loss factor.[3]

We recognize that the contingency factor could be accounted for within the initial lodestar calculation. A court could simply enhance the "reasonable" hourly rate used in calculating the lodestar and forgo post-lodestar adjustments. *See, e.g., Copeland*, 641 F.2d at 893 ("To the extent . . . that an hourly rate underlying the 'lodestar' fee itself comprehends an allowance for the contingent nature of the availability of fees in Title VII litigation. . . , no further adjustment duplicating that allowance will be made."); *Berger, supra*, at 325-26. This approach is problematic because there really is "no such thing as a market hourly rate in contingent litigation." 2 M. DERFNER & A. WOLF, *supra*, ¶ 16.04[4][a], at 16-100.15. Accordingly, most courts choose to employ "real" hourly rates in the lodestar calculation—*i.e.*, "the normal hourly charge in the community for noncontingent, contemporaneous payment in litigation of similar complexity and difficulty, by a lawyer with similar experience and reputation," *id.*, ¶ 16.03[1][a], at 16-47 (footnotes omitted)[4] —and only later adjust the product upward to account

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[3] The majority's extended discussion of whether the five votes that adopt this position constitute a binding majority of the Court seems to us overly pedantic, and mostly irrelevant. It is axiomatic that lower court judges routinely consider and weigh the diverse statements in Supreme Court opinions, especially those propositions garnering a majority, to seek guidance in the disposition of subsequent cases. Indeed, that is precisely what our sister circuits have done in construing *Delaware Valley II*.

[4] The Supreme Court acknowledged as much in *Blanchard* when it stated that the lodestar figure is to be derived by "applying *prevailing billing rates* to the hours reasonably expended on successful claims." 489 U.S. at 94 (emphasis added).

for the contingency factor. *See id.*, ¶ 16.04[4][a], at 16-100.15-.16. The difference in the mathematical formulas makes no difference in the result, of course, so long as the court is careful to avoid "double-counting" by blending the two approaches. *See Copeland*, 641 F.2d at 893. The point here is, however, that under the approach followed by most courts—and followed by the District Court in this case—the contingency factor is *not* subsumed within the initial lodestar calculation; consequently, if the lodestar is not itself adjusted upward, the lawyer's economic risk will go uncompensated.

The majority rejects the prevailing view that enhancements are available because it can find no governing principle in *Delaware Valley II*. With no precedent or logic to support its opinion, the majority simply decides that contingency enhancements never should be permitted. This rule is created completely out of new cloth. Neither the plurality, concurring, nor dissenting opinion in *Delaware Valley II* holds that contingency enhancements are *never* available. In a sweep of reasoning that defies comprehension, the majority attempts to dismiss Part V of Justice White's plurality opinion because Justice O'Connor declined to join this portion of the plurality. But, of course, as is clear from the Court's opinion, Part V remains as written and means what it says: *see, e.g.*, 483 U.S. at 728 ("enhancement for the risk of nonpayment should be reserved for exceptional cases where the need and justification . . . are readily apparent and are supported by evidence in the record and specific findings by the courts"); *id.* at 731 ("[A] fee award should be informed by the statutory purpose of making it possible for poor clients with good claims to secure competent help. Before adjusting for risk assumption, there should be evidence in the record, and the trial court should so find, that without risk enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market."). Whatever substantive criteria

these statements may stand for, they certainly do not reflect a *per se* rule against contingency enhancements. In any event, the one thing that is absolutely clear from *Delaware Valley II* is that the Supreme Court *declined* to reject the possibility of contingency enhancements.

Furthermore, the majority in this case, having decided that *Delaware Valley II* does not control interpretation of the fees statute, does absolutely no work to interpret the statute. Rather, the majority relies on the utterly irrelevant proposition that "the question of attorney's fees must not turn into major litigation itself," *see Delaware Valley II*, 483 U.S. at 722, to reach a *per se* rule barring all contingency enhancements. Of course, the majority's fear could be avoided equally well by routinely granting contingency enhancements. Even a test which looks to whether, in the relevant market, contingency fees are needed to induce attorneys to represent plaintiffs in these actions, will not create much hardship after district and circuit courts establish precedent regarding the major markets. Given that the contingency enhancement question merely asks the court to decide the prevailing market for legal services, it is no more onerous than any other fee inquiry.

The majority's result also flies in the face of the decisions from *every* circuit that has considered the issue since *Delaware Valley II*. In creating a split in the circuits, the majority now causes the D.C. Circuit to stand oddly alone on this question. Of the thirteen circuits applying *Delaware Valley II*, none—save the D.C. Circuit—has completely ruled out contingency enhancements. *See, e.g.*, *Jacobs v. Mancuso*, 825 F.2d 559, 561 (1st Cir. 1987) (disallowing contingency, not because of *per se* rule, but because "liability here was so plain . . . that, as a practical matter, the risk of not recovering a fee was all but eliminated"); *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295, 298 (2d Cir. 1987) (fee enhancement available when "[w]ithout the possibility of a fee enhance-

ment . . . competent counsel might refuse to represent . . . clients thereby denying them effective access to the courts") (quoting *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986)); *Kelly v. Matlack*, 903 F.2d 978 (3d Cir. 1990) ("in order to qualify for an enhancement, a plaintiff must establish that without adjustment it would have faced substantial difficulties in finding counsel in the . . . relevant market") (citations omitted); *Craig v. Dep't of Health & Human Servs.*, 864 F.2d 324, 327 (4th Cir. 1989) (dicta) (reading *Delaware Valley II* to permit fees in "exceptional circumstances"); *Albert v. Kleveenhagen*, 896 F.2d 927, 936 (5th Cir.) (enhancement available when district court "make[s] the findings required by Justice O'Connor's concurrence in *Delaware Valley II*"), *reh'g granted in part*, 903 F.2d 352 (5th Cir. 1990); *Perotti v. Seiter*, 935 F.2d 761, 765 (6th Cir. 1991) ("This court has upheld multipliers for the risk of non-compensation in contingent-fee cases subsequent to *Delaware Valley.*") (citing *Fite v. First Tennessee Production Credit Ass'n*, 861 F.2d 884 (6th Cir. 1988)); *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 553 (7th Cir. 1991) (following Justice O'Connor's test as the *Delaware Valley II* "holding"); *Morris v. American Nat'l Can Corp.*, 941 F.2d 710, 715 (8th Cir. 1991) ("Justice O'Connor's opinion in *Delaware Valley II* is the current legal standard for awarding contingency enhancements. . . . We are persuaded that the district court abused its discretion in concluding that [plaintiff] failed to establish that she would have faced substantial difficulties in retaining counsel absent risk enhancement."); *Bouman v. Block*, 940 F.2d 1211, 1235-36 (9th Cir. 1991) (upholding fee on the basis of district court's findings matching Justice O'Connor's test), *petition for cert. filed*, 60 U.S.L.W. 3344 (Nov. 5, 1991); *Smith v. Freeman*, 921 F.2d 1120, 1123 (10th Cir. 1990) (quoting the *Delaware Valley II* plurality that "enhancement for the risk of nonpayment should be reserved for exceptional cases where the need and justification for such enhancement are readily

apparent and are supported by evidence in the record and specific findings by the courts"); *Martin v. University of South Alabama*, 911 F.2d 604, 610-12 (11th Cir. 1990) (following Justice O'Connor's test); *Crumbaker v. Merit Systems Protection Board*, 827 F.2d 761, 761 (Fed. Cir. 1987) ("the Board on remand shall consider the degree to which the relevant market compensates for contingency and whether any enhancement is necessary to bring the fee within a range that would attract competent counsel").

Additionally, despite the majority's assertion that the tests developed in many circuits are "difficult, if not impossible, to meet," even courts of those circuits have continued to award contingency enhancements in some circumstances. *See, e.g., Morris v. American Nat'l Can Corp.*, 941 F.2d 710, 716 n.2 (8th Cir. 1991); *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 891 F.2d 842, 849-50 (11th Cir. 1990); *Shirley v. Chrysler First, Inc.*, 763 F. Supp. 856, 860 (N.D. Miss. 1991); *Vargas v. Calabrese*, 750 F. Supp. 677 (D.N.J. 1990); *Bauman v. Jacobs Suchard, Inc.*, No. 89 C 5452, 1991 U.S. Dist. LEXIS 8847 (N.D. Ill. 1991).

Thus, setting aside the more contentious question of what degree of enhancement is appropriate, there ought to be no dispute that *some* upward adjustment of the lodestar fee is permissible where the prevailing attorney assumed the greater risk inherent in contingent-fee cases. There is simply no justification—in the staute, in the case law or in common sense—for the suggestion that contingent-fee lawyers may not be fully compensated for their services.

II.

With regard to the particular facts of this case, there is no basis under the abuse-of-discretion standard of review to overturn the District Court's decision to allow a 50% enhancement of the lodestar fee submitted by Ms. King's counsel. Although the Supreme Court's guidance

concerning the appropriate method for *calculating* a contingency adjustment has been regrettably uncertain, the trial court's decision in this case is consistent with what standards can be gleaned from recent cases.

The clearest instruction found in the Supreme Court's cases is that fee awards must be tied to evidence of the fee practices prevailing in the local legal market. *See, e.g., Jenkins*, 491 U.S. at 283, 285; *Blum*, 465 U.S. at 894-95; *Delaware Valley II*, 483 U.S. at 733 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 754 (Blackmun, J., dissenting). That was done in this case. In reaching its determination, the District Court expressly relied upon attorney affidavits filed by the plaintiff and an earlier decision in the same district in which another trial judge had found that "attorneys in the Washington[,] D.C.[,] community will only accept a fully contingent case if their recovery will be at least double their normal hourly billing rate and will only accept a partially contingent case if their recovery is enhanced by at least 50 percent." *See Palmer v. Shultz*, 679 F. Supp. 68, 74 (D.D.C. 1988), *quoted in King v. Palmer*, Civ. Action No. 83-1980, mem. op. at 4 (D.D.C. Sept. 20, 1988).

Another way to assess the reasonableness of the fee amount awarded by the District Court is pursuant to the two-prong test set forth in Justice O'Connor's concurring opinion in *Delaware Valley II*. Although it is unclear what precedential force that opinion should be given, *cf. Marks v. United States*, 430 U.S. 188, 193 (1977), it is nonetheless a source of some guidance and it is further indication that the judgment of the District Court should be affirmed in this case. Under the first prong of Justice O'Connor's test, lower courts would be required to "treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market." 483 U.S. at 733 (O'Connor, J., concurring in part and concurring in the judgment). Under the second prong, "the fee applicant bears the burden of prov-

ing the degree to which the relevant market compensates for contingency." *Id.* Under this second prong, "no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Id.* (quoting from plurality opinion, 483 U.S. at 731).

Under the first prong of Justice O'Connor's test, the District Court here reasonably concluded that "the relevant market" does in fact compensate lawyers for assuming the risk of contingent payment. In addition to the evidence cited in *Palmer v. Shultz*, which went directly to the degree to which the Washington, D.C., legal market customarily compensates for contingency, the court had before it several dozen affidavits from local attorneys swearing either that they generally demand an enhancement over normal hourly rates in order to accept contingent-fee cases or that they refuse such cases altogether because of the risk involved.

Under the second prong of Justice O'Connor's test, Ms. King was required to show that she "would have faced substantial difficulties in finding counsel" had contingency enhancements *not* been customarily available in the Washington, D.C., legal market. This proposition, of course, turning as it does on a counterfactual supposition, is difficult to prove. Nonetheless, Ms. King produced an affidavit from her attorney stating that he would not have taken her case without the prospect of a fee enhancement. *See* Declaration of Robert M. Adler at 2 (Sept. 11, 1987), *reprinted in* Joint Appendix ("J.A.") 74, 75. In addition, she produced further affidavits from several Washington, D.C., Title VII plaintiffs' attorneys corroborating that Ms. King likely would have faced substantial difficulties securing counsel without the promise of a contingency premium.[5] These attestations were reinforced

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[5] In one affidavit, attorney George Chuzi stated:

> During 1983, I was personally familiar with most of the attorneys regularly bringing Title VII suits in the District of

by others documenting the general unwillingness of local attorneys to accept such cases absent some likelihood of receiving an enhancement for risk. On this record, we believe that Ms. King carred her burden under both prongs of Justice O'Connor's test.

Because Title VII and the governing case law clearly permit trial courts to enhance attorney's fees to compensate for the risk of contingent payment, and because the facts of the instant case satisfy whatever standards can be gleaned from recent Supreme Court cases, it cannot be found that the District Court abused its discretion in shaping the fee award in this case. As we noted at the outset, the standard of review in this case is *abuse of discretion*. The majority, however, has simply ignored the constraints of appellate review in second-guessing the findings of the trial judge. Indeed, the majority's approach in this case borders on *de novo review*, in flat defiance of the Supreme Court's instruction that "[i]t is central to the awarding of attorney's fees . . . that the

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Columbia on behalf of plaintiffs. Had Mr. Adler not agreed to represent Mrs. King in this case, I am unaware of any other Title VII attorney who would have agreed in 1983 to represent her on a contingency fee basis (even had she agreed to pay up to $5,000 in legal fees). The only way in which I believe that a competent Title VII attorney would have been convinced to seriously consider this representation was if there was a reasonable possibility of receiving an enhanced fee for risk (over and above hourly rates) if Mrs. King prevailed.

Supplemental Declaration of George M. Chuzi at 2 (Dec. 21, 1987), *reprinted in* J.A. 130, 131; *see also* Declaration of David R. Cashdan at 4 (Apr. 25, 1986) ("I believe that it is highly unlikely that I would have agreed to act as sole counsel in this case."), *reprinted in* J.A. 112a, 112d; Declaration of Robert B. Fitzpatrick at 2 (Apr. 24, 1986) ("I believe that the chances of prevailing in this case . . . were so remote that my firm would not have accepted representation of Mrs. King."), *reprinted in* J.A. 173a, 173b; Declaration of Barry H. Gottfried at 2 (July 31, 1987) ("Had the plaintiff sought to retain me to represent her by filing a suit for the claims involved herein I do not believe that I would have accepted representation."), *reprinted in* J.A. 176, 177.

district court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case." *Blanchard*, 489 U.S. at 96.

III.

The fundamental problem with this case, as with other fee cases, is that the Supreme Court has yet to give us coherent guidance about how to determine the reasonableness of fee awards under Title VII and similar fee-shifting statutes. In this, we share the majority's frustration, if not its solution. In particular, we do not yet know under what circumstances to award a contingency enhancement, nor do we know whether the degree of enhancement allowed by the courts merely *reflects* prevailing market rates or actually *creates* the relevant market forces by defining the extent to which economic risk will be compensated.[6] In our view, the proper answers to these questions ultimately must come from Congress.

Logically, of course, the size of a contingency enhancement should be determined in each case according to the degree of risk actually incurred by the prevailing attorney. It is impossible to determine with any confidence what a "reasonable fee" would be in any particular contingency case without first assessing just how much risk the plaintiff's lawyer actually assumed.[7] *See, e.g.*, S.

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[6] For example, as Judge Williams has pointed out, if courts generally allow a contingency enhancement of 50%, lawyers will have an economic incentive to bring only those cases in which the odds of succeeding on the merits are at least two-to-one; if the court-ordered enhancement figure rises to 100%, lawyers will presumably bring any case in which the chances of winning are at least 50%. *See King v. Palmer*, 906 F.2d 762, 770 (D.C. Cir.) (Williams, J., concurring in panel decision), *vacated & reh'g* en banc *granted*, 906 F.2d 772 (D.C. Cir. 1990).

[7] In this respect, a risk enhancement arguably should not encompass hours of labor for which compensation was secure. In the instant case, the argument could well be made that the risk of nonpayment incurred by Ms. King's counsel virtually vanished after

SPEISER, *supra*, § 8:10, at 320; Berger, *supra*, at 326. In this regard, the Court's apparent disapproval of case-by-case risk assessment. *see Delaware Valley II*, 483 U.S. at 731 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 745-46 (Blackmun, J., dissenting), serves only to frustrate the lower courts as they struggle to shape fee awards that, consistent with legislative purpose, will be "adequate to attract competent counsel" while stopping short of "produc[ing] windfalls" for plaintiffs' lawyers, *see Blum*, 465 U.S. at 897 (quoting S. REP. No. 1011, 94th Cong., 2d Sess. 6 (1976)).

Although we share Justice O'Connor's concern that risk enhancements not be calculated or awarded in "an arbitrary or unjust" manner, *Delaware Valley II*, 483 U.S. at 732 (O'Connor, J., concurring in part and concurring in the judgment), our experience suggests that the two-prong test enunciated in the concurring opinion in *Delaware Valley II* cannot be applied without difficulty. The panel opinions in this case and in *McKenzie v. Ken-*

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this court decided the merits in Ms. King's favor in 1985. In *King v. Palmer*, 778 F.2d 878 (D.C. Cir. 1985), this court reversed the District Court's entry of judgment for the defendants and remanded the matter with instructions "to enter judgment for Ms. King and to determine an appropriate remedy." *Id.* at 882 (footnote omitted). "At a minimum," we noted, "it appears that the appropriate remedy in this case should include the promotion of Ms. King . . . , her receipt of back pay, and a full consideration of any further relief." *Id.* at 882 n.7. Once Ms. King prevailed on the merits of her main claim, the defendants recognize, she qualified for an award of fees for "hours reasonably expended [thereafter] on remedial and similar ancillary matters." *See* Brief for Appellees/Cross-Appellants at 39. At least once it was established that there would be no review of the merits in the Supreme Court, there remained no risk of nonrecovery. Accordingly, the District Court probably could have, within the bounds of its discretion, eliminated from the risk-enhancement calculation fees for post-1985 work for which lodestar payment was certainly due.

nickell, 875 F.2d 330 (D.C. Cir. 1989), illustrate the two dilemmas inherent in this test. First, although the affidavits in both cases clearly establish that lawyers routinely demand the equivalent of a significantly higher hourly fee if they accept a case on a contingent-fee basis, those same affidavits also demonstrate that there is no one "market rate" or contingency fee arrangement for all such cases. Instead, lawyers predictably evaluate the case of each potential client independently and decide whether to accept representation and what to charge based on their estimation of the likelihood of success and the amount of fees they will receive if they do, in fact, prevail.[9] Consequently, it is arguably unrealistic to assume that a court can determine one specific level of enhancement that the market demands in contingent-fee cases "as a class."

Second, the so-called "substantial difficulties" test is a confusing and potentially mischievous requirement. For example, the requirements that the court determine the amount of enhancement by looking at contingency cases as a class, and that it look at the circumstances of the particular case only to determine if the plaintiff would have had substantial difficulty in obtaining counsel without the enhancement, force trial judges to award contin-

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[8] To the contrary, lawyers claimed to demand contingency enhancements from 33% to 300% of their regular hourly rates. Other lawyers did not specify a percentage, saying only that they needed a "reasonable" risk enhancement to accept a Title VII case on a contingent basis.

[9] As a result, the lawyer and client may tailor the terms of the contract to address the risks and potential rewards involved in each case. *See, e.g.*, Declaration of Nora A. Bailey at 2 (Aug. 12, 1987), *reprinted in* J.A. 82, 83; Declaration of John R. Erickson at 2 (Nov. 16, 1987), *reprinted in* J.A. 168, 169; Declaration of Chester T. Kamin at 2-3 (Aug. 24, 1987), *reprinted in* J.A. 193, 194-95; Affidavit of David N. Webster at 6 (Sept. 20, 1982) ("The greater the uncertainty of result, the greater the percentage fee may be, albeit always within the limit of reasonableness."), *reprinted in* J.A. 289, 294.

gency enhancements on an all-or-nothing basis. The judge must either award the supposed "market" risk enhancement or no enhancement at all; there is no leeway for the court to decide that some enhancement is apppropriate, but that it should be less than the previously determined "market" rate. Although the awards calculated by this method are concededly uniform, they may be nonsensical insofar as they overcompensate some plaintiffs with not-so-risky cases while inadequately compensating others with especially risky ones.

Consequently, we believe that district judges, in enhancing the lodestar to account for the risk of nonpayment, should have the same discretion that they have in determining other components of the reasonable fee. Although no one formula can be devised for all cases, we think that district courts should consider both the size of the attorney's investment in the case and the likelihood that that investment would not be recouped. For one thing, in determining whether a contingency enhancement is necessary to enable the plaintiff to secure counsel, the court could consider the amount that the lawyer would lose if the plaintiff did not prevail. *See Delaware Valley II*, 483 U.S. at 747-48 & n.12 (Blackmun, J., dissenting); *Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 613-14 (1st Cir. 1985). The court thus might consider factors such as

> what, if any, payment the attorneys would have received had the suit not been successful; what, if any, costs or expenses the attorneys would have incurred if the case had been lost; the extent to which the attorneys were required to compensate associates and to carry overhead expenses without assurance of compensation; and whether other attorneys refused to take the case because of the risk of nonpayment.

Delaware Valley II, 483 U.S. at 748 n.12 (Blackmun, J., dissenting). In our view, contingency enhancements are

appropriate if the lawyer has to expend a substantial amount of her time and resources to litigate a case and there is a significant risk of not prevailing (and thus of not recouping her investment).

For another thing, the court could consider the plaintiff's likely "ability to prove liability and damages . . . [and the legal precedent] either in favor of or against the theories put forth in the case" in order to determine the magnitude of the risk that the plaintiff would not prevail. *See Wildman*, 771 F.2d at 612. We recognize that it is impossible to determine such risk with any methematical precision, and we are cognizant of the supposed ethical tensions such calculations may engender,[10] but we do think that a district court judge, who is familiar with the factual and legal development of the case, can differentiate—after the fact—among cases based on the probability of success in the beginning. As the plurality in *Delaware Valley II* recognized, in some cases there is very little risk of not prevailing, and no enhancement for contingency, or only a very small one, should be

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[10] The plurality summarized these concerns in *Delaware Valley II*:

> [E]valuation of the risk of loss creates a potential conflict of interest between an attorney and his client, for in order to increase a fee award, a plaintiff's lawyer must expose all of the weaknesses and inconsistencies in his client's case, and a defendant's attorney must either concede the strength of the plaintiff's case in order to keep down the fee award, or "allo[w] the fee to be boosted by the contingency bonus [by] insisting that the plaintiff's victory was freakish."

483 U.S. at 721-22 (quoting Leubsdorf, *supra*, at 483). The latter of these concerns is, of course, not an attorney-client conflict at all, but simply a strategic dilemma for the defendant of the sort that is not unknown in litigation. To the extent that the first represents a genuine potential for attorney-client conflict, we are reassured by the confidence the Supreme Court has previously expressed for lawyers' ability to put their clients' interests ahead of their own. *See Evans v. Jeff D.*, 475 U.S. 717, 727-28 (1986) ("Although respondents contend that Johnson, as counsel for the

awarded.[11] In other cases, the risk of not prevailing would be substantial and the enhancement should be correspondingly enlarged.[12]

In the absence of further guidance in this area from Congress or the Supreme Court, however, we would adhere to the only secure legislative directive available to us—that assessments of what constitutes a "reasonable attorney's fee" are to be left to the sound and reasoned discretion of trial judges. A decade ago, this court, sitting *en banc*, acknowledged the inherent lack of certainty in this enterprise but concluded that such determinations were nonetheless best left, as Congress intended, with trial judges:

> To the district court judge falls the task of calculating as closely as possible a contingency adjust-

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class, was faced with an 'ethical dilemma' when petitioners offered him relief greater than that which he could reasonably have expected to obtain for his clients at trial (if only he would stipulate to a waiver of the statutory fee award), and although we recognize Johnson's conflicting interests between pursuing relief for the class and a fee for the Idaho Legal Aid Society, we do not believe that the 'dilemma' was an 'ethical' one in the sense that Johnson had to choose between conflicting duties under the prevailing norms of professional conduct. Plainly, Johnson had no *ethical* obligation to seek a statutory fee award. His ethical duty was to serve his clients loyally and competently.") (footnote omitted; emphasis in original). If a lawyer can be trusted to serve his client faithfully at the cost of his entire statutory fee award, we feel sure he can be trusted to do so at the cost of some potential diminution of it.

[11] The plurality in *Delaware Valley II* voted to reverse the 50% risk enhancement of lodestar fees incurred to enforce a consent decree in part because there was not "a real risk of not persuading the District Court to enforce its own decree." 483 U.S. at 730.

[12] In saying that the district court should have the discretion to tailor the contingency enhancement to the particular case, we are not saying that the experience of other similarly situated plaintiffs can be disregarded. To the contrary, we think that the success rate of other plaintiffs who have filed suits based on similar legal theories is a good indicator of the risk presented in the case.

> ment with which fairly to compensate the successful attorney. We have not . . . lost sight of the fact that this adjustment is inherently imprecise and that certain estimations must be made. For example, it is difficult in hindsight to determine the risk of failure at the commencement of a lawsuit that ultimately proved to be successful. Thus, we ask only that the district court judges exercise their discretion as conscientiously as possible, and state their reasons as clearly as possible.

Copeland, 641 F.2d at 893 (footnote omitted).[13] We can perceive no reason to depart from that conclusion today. Because we discern nothing in the District Court's judgment that would suggest an abuse of discretion justifying reversal, and nothing at all supporting the majority's new legal rule, we dissent.

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[13] The court further observed:

> The setting of contingency adjustments is particularly within the expertise of the District Judge. As the Supreme Court said long ago, the District Court "has far better means of knowing what is just and reasonable than an appellate court can have." *Trustees v. Greenough*, 105 U.S. 527, 537, 26 L.Ed. 1157 (1882).

Copeland, 641 F.2d at 893 n.24.

APPENDIX B

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 89-7027, 89-7028

MABEL A. KING,
Appellant,

v.

JAMES F. PALMER, Director, D.C.
Department of Corrections, *et al.*

MABEL A. KING

v.

JAMES F. PALMER, Director, D.C.
Department of Corrections, *et al.*,
Appellants.

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 83-1980)

Argued Nov. 17, 1989

Decided June 26, 1990

Order on Rehearing En Banc Granted
and Judgment Vacated
Sept. 12, 1990

Robert M. Adler for appellant/cross-appellee Mabel A. King. Joel P. Bennett also entered an appearance, for Mabel A. King.

Donna M. Murasky, Asst. Corp. Counsel, with whom Herbert O. Reid, Sr., Acting Corp. Counsel, and Charles L. Reischel, Deputy Corp. Counsel, were on the brief, for appellees/cross-appellants Palmer, et al. Susan S. McDonald also entered an appearance, for Palmer, et al.

Before EDWARDS, BUCKLEY, and WILLIAMS, Circuit Judges.

Opinion for the court filed by Circuit Judge BUCKLEY.

Concuring opinion filed by Circuit Judge STEPHEN F. WILLIAMS.

BUCKLEY, Circuit Judge:

These appeals arise from a dispute over attorney's fees sought by Mabel A. King, the prevailing party in a Title VII lawsuit against the District of Columbia and James F. Palmer, Director of the D.C. Department of Corrections (collectively, the "District" or "District of Columbia"). King was represented throughout her lawsuit by counsel on a contingent fee basis. Following judgment on the merits, the district court awarded King attorney's fees and costs, as well as an enhancement for the risk of nonpayment equal to fifty percent of the fees for which counsel was at risk. The District of Columbia contends that *no* enhancement was proper, or alternatively that the level of enhancement should have been only twenty-five percent or less. On the basis of prevailing practice in the Washington, D.C. legal market, we hold that King was entitled to a 100 percent enhancement of the amount of attorney's fees at risk. That enhancement, however, may not be awarded on time devoted to the litigation of fee awards.

I. Background

Mabel King initiated this suit against her employer, the District of Columbia, in July 1983 in order to obtain relief from gender-based discrimination. In September 1984, the district court entered judgment for defendants. On appeal, this court reversed and remanded, instructing the district court to enter judgment for King and to determine an appropriate remedy. *King v. Palmer*, 778 F.2d 878, 882 (D.C.Cir.1985). We noted that the appropriate remedy should include, at a minimum, the promotion of King, an award of back pay, and "a full consideration of any further relief." *Id.* at 882 n.7. We remanded for further consideration King's related claims that she was the victim of a discriminatory work environment and of reprisals for having filed an EEOC complaint. *Id.* at 883. On remand, the district court awarded King a retroactive promotion and back pay, as instructed. The parties settled the claims of the discriminatory work environment and retaliation; the merits of the case are not at issue.

King was represented throughout the proceedings by Robert M. Adler, a sole practitioner, who was assisted on occasion by an associate and a law clerk or paralegal. The fee agreement between Adler and King provided that she would be responsible for billings of up to $5,000, as well as for costs and expenses. The agreement also provided that in the event King were to prevail and recover attorney's fees, she could recover any amounts paid, while Adler would receive whatever additional attorney's fees might be awarded. In effect, then, $5,000 of Adler's total fee was noncontingent.

As a result of this court's decision on the merits, King became entitled to an award of attorney's fees and costs pursuant to the fee-shifting provisions of Title VII. *See* 42 U.S.C. §§ 2000e-5(k), 2000e-16(d) (1982). Accordingly, in March 1986 Adler submitted an application for

an interim award of attorney's fees and costs incurred through February 28, 1986. He requested a "lodestar" fee (the presumptive fee arrived at by multiplying a reasonable hourly rate by the number of hours reasonably expended on the litigation) of $210,160 (based on his historic billing rates), as well as a contingency fee enhancement of thirty-five percent.

By order dated June 11, 1986, the district court awarded interim lodestar fees of $95,937.76. In October 1986, Adler submitted a supplemental application for lodestar fees incurred from March 1 to October 20, 1986, in the amount of $34,485. In addition, he again requested a risk enhancement of thirty-five percent. By order dated February 27, 1987, the court awarded further interim fees of $7,938.

On June 10, 1987, the district court considered the balance of the fee requests and entered a memorandum and order awarding Adler additional lodestar fees and costs of $137,953.28. *King v. Palmer*, Civ. No. 83-1980, Revised Memorandum, 1987 WL 12794 (D.D.C. June 10, 1987) ("Mem. Op. I"). The resulting total lodestar for the case to that point was $232,707.62, based on then-curent billing rates. These fees represented compensation for *all* phases of the litigation including time spent in pursuit of attorney's fees and time spent on various other matters following this court's remand, such as the defendants' petition for rehearing. As to the risk enhancement, the court retained jurisdiction of the matter pending the Supreme Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987). Mem. Op. I at 12. The court noted, however, that a "15 [percent] bonus for the risk of not prevailing would . . . be appropriate in the event that such an award is authorized by the Supreme Court." Mem. Op. I at 13. The court rejected Adler's claim for a bonus based on exceptional success, and that decision is not appealed here.

Following the decision in *Delaware Valley*, Adler again applied for a contingency enhancement, this time requesting an augmentation of 100 percent. On September 20, 1988, the district court awarded plaintiff a fifty percent enhancement for the risk of nonpayment, or a total of $113,858.31, based on the entire contingent portion of the previously awarded lodestar fee ($232,707.62—$5,000 = $227,707.62). *King v. Palmer*, Civ. No. 83-1980, Memorandum at 5, 1988 WL 104970 (D.D.C. Sept. 20, 1988) ("Mem. Op. II").

The district court considered the request for risk enhancement under the standards established by Justice O'Connor's tie-breaking concurrence in *Delaware Valley*. The court found that King had offered evidence that "many lawyers in the civil rights employment discrimination market would not accept employment in a case like this on a purely contingency fee basis." Mem. Op. II at 3. The court asserted, however, that because the fee arrangement in the instant case was only partially contingent, it was distinguishable from the case of *McKenzie v. Kennickell*, 684 F.Supp. 1097 (D.D.C. 1988), *aff'd*, 875 F.2d 330 (D.C.Cir. 1989). Mem. Op. II at 3. Instead, the court relied on *Palmer v. Shultz*, 679 F.Supp. 68 (D.D.C. 1988), which also involved a partially contingent arangement. Mem. Op. II at 3-4. There, the court had determined that "attorneys in the Washington D.C. community will only accept a fully contingent case if their recovery will be at least double their normal hourly billing rate and will only accept a partially contingent case if their recovery is enhanced by at least 50 percent." Mem. Op. II at 4 (quoting *Palmer*, 679 F.Supp. at 74). Adhering to Justice O'Connor's suggestion, in *Delaware Valley*, that "each court let a determination such as Judge Smith's [in *Palmer*] control future cases such as this one," the court adopted a fifty percent enhancement in the instant case. Mem. Op. II at 4.

Both King and the District appealed the enhancement award.

II. Discussion

The District contends that *no* risk enhancement should have been awarded or, in the alternative, that the level of the enhancement should have been twenty-five percent or less. King maintains that it should have been 100 percent of the amount at risk. The District also challenges certain elements of the risk enhancement award, claiming that it was excessive because it was based, in part, on a lodestar that included fees that were not at risk or for which an enhancement was unnecessary to attract competent counsel. We address these issues in turn.

A. The Availability and Level of Risk Enhancement

In *McKenzie v. Kennickell*, 875 F.2d 330, 332-33 (D.C. Cir. 1989), we adopted Justice O'Connor's concurring opinion in *Delaware Valley*, 483 U.S. at 731-34, 107 S.Ct. at 3089-91, as the basis for determining the availability and level of contingency fee enhancements in this circuit. *See also Weisberg v. U.S. Dep't of Justice*, 848 F.2d 1265, 1272 (D.C. Cir. 1988); *Thompson v. Kennickell*, 836 F.2d 616, 621 (D.C. Cir. 1988). We followed the two-part test suggested by Justice O'Connor: first, whether the relevant legal market adds a premium for contingency, and second, whether in the absence of an enhancement for risk the plaintiff would have faced substantial difficulty in finding counsel. *McKenzie*, 875 F.2d at 332.

1. *The Relevant Market Test*

To secure a contingency enhancement, a fee applicant must first show the degree to which the relevant legal market compensates for contingency. *Delaware Valley*, 483 U.S. at 733, 107 S.Ct. at 3090. The "relevant market," for purposes of this analysis, is composed of all contingency claims in the District of Columbia, with special reference to those involving complex federal litigation such as (but not limited to) Title VII cases. *McKenzie*, 875 F.2d at 334-35. In addition, the relevant market

is to be determined as of the time the case was undertaken by counsel, rather than at the time fees were awarded. *Id.* In making such an assessment, "district courts and courts of appeals should treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market" in order to avoid "[h]aphazard and widely divergent compensation." *Delaware Valley*, 483 U.S. at 733, 107 S.Ct. at 3090. We thus rejected an individualized approach to fee awards. *McKenzie*, 875 F.2d at 332, 336, 338.

In awarding a fifty percent enhancement in this case, the district court correctly followed the principle of consistency in fee determinations discussed above, as it adhered to the previous contingency enhancement findings of *Palmer v. Shultz*, 679 F.Supp. at 74. Its error, however, was in applying different levels of enhancement to fully and partially contingent cases. The court asserted, without explanation, that there was a "crucial distinction" between such cases and thereby relied on the finding in *Palmer* that "plaintiffs 'have shown that attorneys in the Washington D.C. community will only accept a . . . partially contingent case if their recovery is enhanced by at least 50 percent.'" Mem. Op. II at 4 (quoting *Palmer*, 679 F.Supp. at 74).

Although the *Palmer* court's calculations of attorneys' fees are difficult to discern, it appears to us that it actually awarded an enhancement of 100 percent of the *contingent portion* of the fees—precisely the enhancement urged by King—even though the court referred to a fifty percent enhancement for partially contingent cases. Palmer was obligated to pay her counsel approximately fifty-three percent of their fees; thus, the case was about forty-seven percent contingent. *See* 679 F.Supp. at 73. Counsel charged plaintiff rates that were considerably below market. *Id.* at 71-72. The total lodestar award was $291,160.43, which was based on historic *market* rates. *Id.* at 76. For purposes of the enhancement, however, the

court used a lodestar figure of $143,612.34, which was based on the historical rates actually charged by counsel. *See* id. at 73-76; Affidavit of Ellen Kabcenell Wayne, at 4 (counsel in *Palmer* describing calculation of fee enhancement). The enhancement award of $71,806.17, therefore, was exactly fifty percent of the lesser amount, and slightly over 100 percent of the contingent portion (forty-seven percent). *See Palmer*, 679 F.Supp. at 76.

Be that as it may, we conclude that the same percentage enhancement should be applied to the contingent portion of a fee regardless of whether the case is fully or partially contingent. None of the affidavits in the record reveals a practice of charging a lower percentage enhancement of the amount at risk in partially contingent arrangements, nor do previous decisions in our circuit reflect such a practice. As an economic matter, such an approach makes little sense: we see no reason why Adler, whose fee was ninety-eight percent contingent, should not receive the same rate of enhancement as an attorney who accepted the case on a 100 percent contingent basis. In either case, the attorney would face the same risk of nonpayment for services rendered on a contingent basis, and should therefore be entitled to receive the same percentage enhancement on whatever portion of the lodestar that is at risk.

The question to be determined, then, is the level of enhancement prevailing in the relevant Washington market in 1983. King submitted declarations of over seventy practitioners in support of her contention that a 100 percent risk enhancement was required to ensure contingency representation in the Washington market. Although the District correctly observes that many of these affidavits refer only to a "reasonable" enhancement while others range from significantly below to significantly above 100 percent, we find that the bulk of the evidence supports a 100 percent enhancement as to both the current and the 1983 markets. *See, e.g.*, Declaration and Supp. Declara-

tion of John R. Erickson; Declaration and Supp. Declaration of Joel P. Bennett.

The District nevertheless argues that as Adler himself initially requested only a thirty-five percent enhancement in this case and as he had been awarded only a ten percent enhancement in an earlier Title VII case, *see Bundy v. Jackson*, Civ. No. 77-1359 (D.D.C. Sept. 14, 1982), Adler could not reasonably have expected an enhancement of fifty percent, much less 100 percent, when he agreed to represent King. However true that may be, the District's approach would "contravene the settled doctrine . . . that fees must be awarded regardless of the identity of the fee petitioner." *McKenzie*, 875 F.2d at 338. In *McKenzie* we "reject[ed] the notion that applicants must demonstrate that they . . . were specifically attracted by the possibility of a contingency enhancement." *Id.* Rather, as Justice O'Connor counseled in *Delaware Valley*, we treat contingency cases as a class, based on the prevailing practices within the relevant legal market.

That practice has now been defined, in a number of recent decisions within this circuit, as requiring a contingency enhancement of 100 percent for the class of cases relevant here. *See, e.g., Thompson v. Kennickell*, 710 F.Supp. 1, 6, 9 (D.D.C. 1989) (awarding enhancement of 100 percent and finding "that the attorney market in the District of Columbia requires contingency enhancements of 100% to 200%"); *Palmer v. Shultz*, 679 F.Supp. at 74 ("at least 100 percent" for fully contingent cases); *Broderick v. Ruder*, Civ. No. 86-1834, Mem. Op. at 4 (D.D.C. Sept. 13, 1989) (awarding 100 percent enhancement); *see also McKenzie*, 875 F.2d at 336 (upholding a 50 percent enhancement, which plaintiff had not appealed, as permissible but describing it as "below the Title VII contingency enhancements typically awarded in this circuit").

We note that although the 100 percent enhancement established by the Washington legal market is substantially higher than the upper limit of one-third urged by Justice White in his plurality opinion in *Delaware Valley*, 483 U.S. at 730, 107 S.Ct. at 3089, it does not provide attorneys with the incentive to take on cases "in which [they] believe[] there is less than a 50-50 chance of prevailing," which the plurality would discourage. *Id.* This is so because with a 100 percent enhancement, attorneys who calculate the risks of the cases they agree to litigate will only realize their non-contingent rates of compensation if they succeed in at least fifty percent of those taken on a contingency basis. Of course, some attorneys will undoubtedly choose to accept higher risk cases because of their personal belief in the cause, the novelty of the issue, or the potential importance of the case. Under our ruling, however, attorneys who accept such cases must bear the cost of the added risk.

To recapitulate, we hold that the district court erred as a matter of law in setting the enhancement at fifty percent. Based on the standards of *McKenzie*, the record before us, and prior decisions within this circuit, we find that the appropriate enhancement to be awarded Adler for his risk of nonpayment is 100 percent of the amount of lodestar fees at risk. Moreover, in conformity with the goal urged by Justice O'Connor, and adopted by this court, that contingency cases within a given market be treated consistently, *see Delaware Valley*, 483 U.S. at 733, 107 S.Ct. at 3090; *McKenzie*, 875 F.2d at 332, we hold 100 percent to be the appropriate contingency enhancement to be awarded in the District of Columbia until new evidence indicates a significant change in the legal market—or until we receive new guidance for the award of contingency fees from either Congress or the Supreme Court.

2. *The Substantial Difficulty Test*

To prevail on her claim for fee enhancement, King must also establish, pursuant to the second prong of the *McKenzie* test, that in the absence of a risk enhancement, she would have faced substantial difficulty in securing the services of a competent lawyer at the time she sought one. *McKenzie*, 875 F.2d at 332, 336-38. This inquiry, we explained, is "necessarily a counterfactual [one]; [attorneys seeking enhancements] are not required to show that plaintiffs actually did face difficulty." *Id.* at 337. Nor is it necessary for them to demonstrate that they were "specifically attracted by the possibility of a contingency enhancement." *Id.* at 338.

The District contends that the award should be reversed because the district court made no finding that King would have faced substantial difficulties in securing counsel in the absence of risk enhancement. In addition, the District attacks the sufficiency of the evidence proffered by King, arguing that the affidavits submitted are not conclusive proof that there were no lawyers who would have taken King's case on a contingent basis without the possibility of enhancement. The District speculates, for instance, that a public interest group or possibly one of several private attorneys *might* have agreed to represent her, although its argument rests not on any affirmative evidence but merely on supposed ambiguities in certain of the affidavits submitted by King.

It is true that the district court did not explicitly find that King would have faced substantial difficulty in obtaining counsel in the absence of risk enhancement. That finding, however, was implicit in the court's citation to the *Palmer* court's findings that attorneys in the District would not accept contingent cases without some risk enhancement. Mem. Op. II at 2, 4. Moreover, the affidavits filed with the court make it abundantly clear that without this inducement, King would have faced substantial difficulty retaining counsel. *See, e.g.*, Supp. Declaration

of George M. Chuzi ("During 1983, I was personally familiar with most of the attorneys regularly bringing Title VII suits in the District of Columbia on behalf of plaintiffs. Had Mr. Adler not agreed to represent Mrs. King in this case, I am unaware of any other Title VII attorneys who would have agreed in 1983 to represent her on a contingency fee basis [without some risk enhancement].").

The District's attacks on the sufficiency of King's evidence are unavailing. The test adopted by this court does not require a showing that it would have been impossible to secure counsel on other than an enhanced contingency fee basis, as the District's arguments seem to assume; it requires only a showing of "substantial difficulty." Moreover, the evidence submitted need not be scientifically or statistically unassailable; "[e]vidence in the form of affidavits from practitioners is acceptable." *McKenzie*, 875 F.2d at 337-38. Here, King has met her burden.

Finally, we are unimpressed by the District's argument that Adler's willing representation is relevant evidence that King has failed to satisfy the "substantial difficulty" test. Adler himself declared in an affidavit that he would not have accepted the case without the possibility of risk enhancement. For its part, the District offered no evidence that Adler would have taken the case without risk enhancement; it merely points to the fee agreement with King, in which Adler states the obvious fact that "there is no assurance" as to the amount of an attorney's fee recovery, if any. More fundamentally, however, it is irrelevant that Adler might have accepted King's case without an enhancement, *so long as* she was able to demonstrate (as she has) that hers is in a class of cases in which "plaintiffs *would have* faced 'substantial difficulties' [in securing counsel] in the absence of contingency enhancements." *McKenzie*, 875 F.2d at 337 (emphasis in original).

B. Challenged Elements of the Risk Enhancement Award

The District argues that even if some enhancement is appropriate, certain portions of the district court's risk enhancement award should be set aside. The District asserts, first, that the lodestar on which the enhancement was calculated should not have included fees for any time spent after December 13, 1985, when this court issued its decision on the merits, because such fees were no longer truly at risk.

We agree with the District that compensation for time devoted to securing an award of attorney's fees may not be enhanced. It is not disputed that the time spent litigating a fee award is itself compensable. *Copeland v. Marshall*, 641 F.2d 880, 896 (D.C. Cir. 1980) (en banc) Thus such compensation is not subject to a genuine risk of loss. Furthermore, as Adler himself admitted at oral argument, we doubt that lawyers require special incentives to pursue their own compensation. We therefore hold that contingency enhancements may not be applied to fees accrued in petitioning for, or litigating, fee awards. *See Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1219 (3d Cir. 1978) ("[H]ours devoted to the fee petition should not be augmented . . . because of the contingent nature of the case. . . .").

We affirm the district court, however, as to all the remaining elements of the lodestar. In originally calculating the lodestar, the district court fully addressed and discussed the compensability of Adler's time following this court's remand. *See* Mem. Op. I at 8-9, 15-18. From the district court's opinion, it is clear that King was not assured of victory on the merits at the time she incurred the post-remand fees. Rather, these fees related to the defendants' petition for rehearing, the United States' motion to file an *amicus* brief, and the retaliation and hostile work environment claims remanded by this court. Accordingly, "in view of the district court's superior understanding of the litigation," we conclude that the court

properly based enhancement on all the contingent elements of the lodestar fee except that attributable to time spent in pursuit of attorney's fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983).

Lastly, the District argues that the risk enhancement award was erroneously calculated on a lodestar that was computed using Adler's then-current, as opposed to historic, billing rates. The result, claims the District, was to magnify the amount appropriate to compensate for risk of loss by adding to the contingency enhancement an "interest" factor designed to compensate for delay in payment. Both parties concede that the use of then-current rates in calculating the lodestar was appropriate as compensation for delay in receiving fees—in other words, as the equivalent of interest. As the economic cost of the risk of nonpayment for which he is to be compensated began at the commencement of representation, we see no reason why counsel should not be compensated for the delay in receiving the enhancement award as well.

III. Conclusion

We hold that King is entitled to a risk enhancement of 100 percent of the amount of fees at risk. We also hold that the enhancement may not be applied to fees awarded for time spent on attorney's fees matters. We therefore reverse the order of the district court and remand for a calculation of fee enhancement and entry of judgment in accordance with this opinion.

Reversed and Remanded.

STEPHEN F. WILLIAMS, Circuit Judge, concurring:

I concur in the opinion of the court except for the passage at 766-67 that rests approval of the 100% enhancement on affidavits as to market conditions. I write separately to explain why I regard the selection of a risk

enhancement figure as in reality a policy choice, one which we as courts are not qualified to make but are required to by controlling precedent. I conclude with a few thoughts on the implications of contingency enhancements with one-way fee-shifting.

I

The opinion's sifting of evidence as to the local market for work on a contingent fee in my view veils a policy judgment: a decision on what the minimum chances of victory must be for a case to be financed by the combination of fee-shifting with contingency enhancements. The answer is, in effect, to allow such financing for any case where the plaintiff's prospects of success are 50% or better.

Unless we impute irrationality to lawyers as a class, we must assume that they are ready to work on contingency at a whole range of premium levels that will, adjusting for the riskiness of the case and for their own risk aversion, make the contingent work the equivalent of noncontingent. Thus, momentarily putting aside risk aversion, if they can get double the basic fee, they will be ready to handle cases with a 50-50 chance of victory or better (the fee in half the cases, doubled, equals noncontingent reimbursement in 100% of cases); if they can recover triple the basic fee, they will be ready to take cases with a 33% chance of victory or better (the fee in one third of the cases, tripled, equals noncontingent reimbursement in all); and so on.

Risk aversion—the conventional preference for an assured $1000 over a 50-50 chance of $2000, or for a bird in the hand over two in the bush—may change the numbers slightly, but probably not a great deal; a large law office, at least, can diversify the risks over a large range of cases. Of course to keep the risks satisfactory, lawyers must make sure to take pools of somewhat homogeneous cases; winning three $1000 cases will not balance losing three $100,000 ones.

We have here a slew of affidavits from local lawyers, many asserting an unwillingness to take contingent work on a basis of less than 100% enhancement, others a vaguer insistence on "reasonable" enhancement. I have some skepticism about the alleged insistence on 100% enhancement; if a lawyer can identify a class of cases with a two-out-of-three chance of success, he will need only a 50% enhancement to attain the equivalent of non-contingent pay. Justice White plainly recognized the point in his opinion in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987), when he suggested a percentage limit to deter lawyers from bringing suits "in which the attorney believes there is less than a 50-50 chance of prevailing." *Id.* at 730, 107 S.Ct. at 3089. (Justice White set that percentage at 33⅓%. In fact, this would require lawyers to insist on cases with a three-out-of-four prospect of success.)

If I am right as to the relation between riskiness and premium, the assertion of many lawyers that they will take a contingent fee case only at a 100% enhancement or better is puzzling. One possibility is simply that plaintiff has been much more assiduous than defendant at ferreting out supporting statements. Another is that fine-tuning the risk level in terms of a line between 50-50 and two-out-of-three is very difficult—clients do not tell the whole story, juries are a bit of a gamble, judges perhaps no better. Nonetheless, lawyers and clients do make judgments of this sort when they evaluate settlement proposals, so I suspect that if Congress set 50% as the maximum enhancement for a shifted contingent fee, a very considerable bar would develop to handle such business. In sum, I view causation as running in the opposite direction from that supposed by the controlling precedents; I see the judicial judgment as defining the market, not vice versa.

Thus the decision seems to me properly Congress's. For when we look beneath the veneer of market analysis, the allowance of a 100% enhancement is clearly legislative—making the policy judgment that it is suitable to allow use of enhanced contingent fee-shifting for cases with a 50-50 chance of success or better. I know of no basis on which a court would be competent to select that level—or any other. But given the various precedents aptly summarized in Judge Buckley's opinion, I believe we have no choice but to make the judgment. The only guidance that we have on the subject is section V of Justice White's opinion in *Delaware Valley*, a section joined by three other Justices. As I've already noted, that discussion points in two directions: the proposed 33⅓% enhancement implies a minimum-prospect case with a .75 chance of success, but the proposed 50-50 minimum-prospect case implies a 100% enhancement. As my colleagues have chosen the 100% (and thus 50-50), and the entire legislative judgment is one on which I have no claim to authority at all, I certainly have no basis for dissent.

II

The implications of contingency enhancements with one-way fee-shifting are curious. In the normal contingency fee arrangement (i.e., without fee-shifting), the plaintiff's possible gain sets a limit on the investment of legal effort; it usually represents the sole source of any return on that investment. There will of course be cases of principle, but they will not feed or clothe much of the bar much of the time. To introduce one-way fee-shifting, as Congress has for Title VII of the 1964 Civil Rights Act; see *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S.Ct. 694, 701, 54 L.Ed.2d 648 (1978) (construing fee-shifting section, which allows fees for the "prevailing party," as allowing awards to prevailing defendants only when plaintiff's claim was "frivolous, unreasonable, or groundless"), weakens but does not elimi-

nate that barrier. It survives to a degree, because without enhancements for contingency, counsel must contract for enough of plaintiffs' possible recoveries to compensate themselves for the time spent on unsuccessful suits. The enhancement for contingency lowers the barrier still further; where it is set at 100%, as here, all cases with a 50-50 chance or better become promising spots for investment of legal effort. (Plaintiff's potential recovery has a residual relevance even here, as agreements entitling the lawyer to part of the recovery provide an additional source of compensation for time spent on losers.)

But this does not mean that all 50-50 cases will be litigated to the hilt; a defendant can just give up. If one assumed that the stakes were symmetrical (a dollar gain for plaintiff being matched by a dollar loss for defendant), the same forces that in conventional contingent-fee litigation limit the plaintiff's lawyer's investment would operate indirectly, through the defendant (though with the terms of the likely settlement affected by the one-way characteristic of the fee-shifting, a matter addressed below). Often, however, they will not be. For example, in a case by an employee claiming wrongful dismissal, there may be only a modest gain to the plaintiff from securing reinstatement; the next-best employment opportunity may be quite similar. But the employer may have come to the view that plaintiff's presence imposes substantial costs—salary (less the employee's positive contribution), plus negative effects on output. The present discounted value of these costs will represent a potential downside risk of the litigation for defendant.

In considering settlement, defendant will look at the following (at least) as the costs of persisting: (1) his additional legal fees; and (2) the costs of losing, including (a) monetary judgments, (b) the sort of costs suggested in the paragraph above, and (c) the costs of plain-

tiff's fee (adjusted for the risk enhancement), all adjusted for the likelihood of losing. Cf. George L. Priest, *Selective Characteristics of Litigation*, 9 J. of Leg.Stud. 399, 401 (1980). The rule we here adopt makes 2(c) a hefty item.

Two consequences emerge, then: First, adding contingent-fee enhancement to one-way fee-shifting enlarges the class of cases that will be brought free of a conventional limit on the investment of legal resources in litigation, namely, the value of the litigation to the plaintiff. It thus implies an increase in the portion of the country's wealth to be devoted to litigation (mainly to lawyers). Second, adding enhancement for contingency greatly improves the plaintiff's bargaining power in settlement negotiations. As several opinions in *Delaware Valley* observed, enhancement of a shifted fee has the effect of making losing defendants pay not only their own litigation costs, and those of the plaintiffs to whom they lose, but also, indirectly, the fees of losing plaintiffs. See 483 U.S. at 719-20, 722, 107 S.Ct. at 3083-84, 3085 (section III-A of Justice White's opinion and thus the opinion of the Court); see also *id.* at 732, 107 S.Ct. at 3090 (O'Connor, J., concurring in part, and concurring in the judgment). *But cf. id.* at 752-53, 107 S.Ct. at 3100-101 (Blackmun, J., dissenting). As the fee-shifting is one-way only, this is not offset by any possibility of defendants' recovering their own legal expenses in the event of victory. The resulting enfeeblement of defendants' bargaining position alters the character of the settlements that will emerge, shifting the real-world impact of the substantive law toward plaintiffs. While one might argue that this shift merely counterbalances factors artificially impeding plaintiff recoveries and thus makes the net impact of the statute correspond to its language, it may in fact carry the balance far beyond that point.

ORDER

Sept. 12, 1990.

Upon consideration of the Suggestion For Rehearing *En Banc* filed by the District of Columbia on July 26, 1990, and based upon the understanding that the suggestion also seeks reconsideration of this court's holding on contingency enhancements found in Parts II.A.2. and 3. in *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989), it is

ORDERED by the Court *en banc*, that the suggestion for rehearing *en banc* is granted and this case will be reheard by the court sitting *en banc*. It is

FURTHER ORDERED, by the Court *en banc*, that the judgment filed herein on June 26, 1990 is vacated. It is

FURTHER ORDERED, by the Court *en banc*, that, in addition to any other arguments the parties may wish to make in their briefs, they specifically address the following question:

> Whether, under the fee-shifting provisions of Title VII, appellant is entitled to receive a risk enhancement in the absence of a specific showing that such an enhancement was necessary in order to enable her to secure competent counsel; and if so, what the level of that enhancement should be.

This case is scheduled for argument before the *en banc* court on Wednesday, February 27, 1991. The following schedule for the filing of briefs shall apply:

(1)	Brief of Mabel A. King	October 30, 1990
(2)	Brief of District of Columbia Parties	December 20, 1990
(3)	Reply brief of Mabel A. King	January 15, 1991
(4)	Joint Appendix	January 22, 1991
(5)	Briefs in final form	January 29, 1991

Thirty copies of each brief and of the joint appendix shall be filed. Should the parties agree that an appendix is unnecessary, they may jointly so advise the court, by letter, and disregard items 4 and 5 of the briefing schedule.

Time at oral argument will be governed by a future order.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-1980-LFO

MABEL A. KING,
Plaintiff,

v.

JAMES F. PALMER, *et al.*,
Defendants.

MEMORANDUM

[Filed Sept. 20, 1988]

A Revised Memorandum and Order filed June 10, 1987, awarded plaintiff attorney's fees totalling $232,707.62, plus $16,276.37 in costs. In addition, the Memorandum indicated that, based on the risk of not prevailing, an additional enhancement of 15 percent for the contingency element of the fee arrangement between plaintiff and her attorney would be appropriate if such an award were authorized by the Supreme Court. Memorandum of June 10, 1987 at 13. The plaintiff's entitlement to this enhancement was, however, held in abeyance pending decision by the Supreme Court in *Pennsylvania v. Delaware Valley Citizens' Council For Clean Air*, 107 S. Ct. 3078 (1987). After this decision plaintiff renewed her request for an enhancement. Instead of 15 percent, she now seeks 100 percent of the fees for which counsel was at risk or an additional award of $227,707.62. Plaintiff's Supplemental Memorandum in Support of an Enhancement to

the Lodestar for Contingency ("Plaintiff's Supplemental Memorandum"), filed September 11, 1987.

The controlling principles established by the *Delaware Valley* opinion appear in the concurring opinion filed by Justice O'Connor. 107 S. Ct. at 3089. The plaintiff has the burden of establishing how contingent fee cases are dealt with "as a class" in the particular market and thereafter establishing that in that market enhancement is "necessary to bring the fee within the range that would attract competent counsel." 107 S. Ct. at 3090-91. In other words, plaintiff must establish that "without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Id.* at 3091.

The particular facts in this case are that plaintiff's counsel undertook this engagement pursuant to a fee agreement entitling him to a retainer of $1,500 applicable to plaintiff's obligation to pay his billings up to $5,000, as well as reimbursement for all costs and expenses incurred by him on his client's behalf. The fee agreement is attached as Exhibit A. In addition, it was agreed that he would receive whatever amount was awarded by the court under the fee shifting provision of Title VII in the event that the plaintiff prevailed. Plaintiff has prevailed and, as stated, plaintiff's attorney has already enjoyed attorney's fees of $232,707.62.

Justice O'Connor's decisive concurrence in *Delaware Valley* instructs lower courts that we

> should treat a determination of how a particular market compensates for contingencies as controlling future cases involving the same market.

Id. at 3090.

The plaintiff has offered evidence that many lawyers in the civil rights employment discrimination market would not accept employment in a case like this on a purely contingency fee basis. For example, one of the leading mem-

bers of the Bar, Joel P. Bennett, Esq., has filed an affidavit that he would not do so. Declaration of Joel P. Bennett, Exhibit P to Plaintiff's Supplemental Memorandum. However, none of the evidence presented deals directly with the particular facts here, i.e., a plaintiff prepared to pay a retainer applicable to a non-contingent fee of $5,000 and to underwrite all costs and expenses, in addition to the entitlement to the statutory fee award in the event of victory. This is a crucial distinction between this case and the case of *McKenzie v. Kennickell*, No. 73-0974, slip op. (D.D.C. April 18, 1988), cited by plaintiff, which involved a purely contingent fee arrangement. However, Judge Smith's opinion in *Palmer v. Shultz*, 679 F. Supp. 68 (D.D.C. 1988), addresses an application to enhance a partial contingent fee on account of the risk of loss. There plaintiff's attorneys agreed to accept for their services an amount equal to one-half of their usual time charges irrespective of the outcome. Judge Smith ruled that

> since a substantial portion of their customary hourly rates was subject to nonrecovery in the event they did not prevail in this litigation . . . plaintiffs would only be entitled to the market's lowest prevailing contingency enhancement rate for quasi-contingent cases.

Id. at 74. Judge Smith further determined that plaintiffs

> have shown that attorneys in the Washington, D.C. community will only accept a fully contingent case if their recovery will be at least double their normal hourly billing rate and will only accept a partially contingent case if their recovery is enhanced by at least 50 percent.

Id.

Justice O'Connor's opinion suggests, if it does not mandate, that each court let a determination such as Judge

Smith's control future cases such as this one. This means that plaintiff's counsel's fee should not be enhanced 100 percent, but should be enhanced by at least 50 percent. Other teachings of the appellate courts and my own experience with fee cases suggest that we should simplify the fee fixing process to the fullest extent that we can. A simple and fair application of these principles would establish 100 percent enhancement for contingent fees, and 50 percent for partially contingent fees. Applying this principle here, an accompanying Order will enhance the $232,707.62 by 50 percent of the fees for which counsel was at risk ($227,707.62), entitling plaintiff to a supplemental payment of $113,853.81.

Date: Sept. 20, 1988

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-1980-LFO

MABEL A. KING,
Plaintiff,

v.

JAMES F. PALMER, *et al.*,
Defendants.

ORDER

For the reasons stated in the accompanying Memorandum, it is this 20th day of September, 1988, hereby

ORDERED that plaintiff shall have judgment against defendant for $113,853.81.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-1980

MABEL A. KING,

Plaintiff,

v.

JAMES F. PALMER, *et al.*,

Defendants.

REVISED MEMORANDUM

[Filed Jun. 10, 1987]

This case is currently before the Court on Plaintiff's Application for an Interim Award of Attorney's Fees and Costs Incurred Through February 28, 1986 ("Plaintiff's First Application") and Plaintiff's Supplemental Application for an Award of Attorney's Fees and Costs ("Plaintiff's Supplemental Application"). Plaintiff's first application for fees was filed on March 20, 1986; defendant filed an opposition on April 18, 1986, and plaintiff replied to that opposition on April 25, 1986. Following a hearing on June 6, 1986, plaintiff was awarded interim fees that were limited to "the core of attorneys' fees and costs that are not seriously contested," *see* Memorandum of June 11, 1986 at 6-7, and consideration of the remaining portion of the fee request was postponed until the Supreme Court decided the then pending case of *City of Riverside v. Rivera*, 106 S. Ct. 2686 (1986). That case was de-

cided on June 27, 1986. In addition, the parties settled the outstanding retaliation and hostile work environment claims on July 10, 1986 and have now thoroughly briefed all matters relating to attorneys' fees for work performed after March 1, 1986. Accordingly, this Memorandum discusses the amount of fees appropriately available to the plaintiff as the prevailing party in this Title VII litigation. *See* 42 U.S.C. § 2000e-5(k).[1]

I.

The Plaintiff's Application for an Interim Award of Fees requests $198,837.50 in fees; a multiplier of $78,609.38 (for the risk of not prevailing and exceptional success and performance by counsel) and costs of $11,489.00 for a total of $288,935.88.[2] Interim fees of $95,937.76 and costs of $8,787.58 have already been awarded on this application. *See* Memorandum of June 11, 1986. This section discusses 1) the hours reasonably spent, 2) the appropriate hourly rate, 3) the appropriateness of a multiplier, and 4) the expenses which are compensable.

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[1] That statute provides, in part,

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

[2] The Memorandum filed March 20, 1986 requested a total of $314,650.00 in attorneys' fees and expenses. However, on April 15, 1987, plaintiff filed a further pleading which notified the Court of mathematical and interpolitive errors in the March 20, 1986 submission. Correction of these errors by plaintiff's counsel has reduced the number of hours for which compensation is requested. All of the figures used in the remainder of this memorandm are taken from plaintiff's April 15, 1987 and April 16, 1987 corrected submissions.

In addition, plaintiff has also withdrawn her request for an increase based on "exceptional performance" of her counsel in light of *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 106 S. Ct. 3088 (1986). *See* Plaintiff's Supplemental Application at 2, n.1; *id.* at 24, n.19. Plaintiff still requests a 10% multiplier based on "exceptional success." *See infra* at 12-14.

Plaintiff's first application seeks compensation for a total of 1,963.50 lawyer or paralegal hours spent in prosecution of her claim from March 11, 1983 through February 28, 1986. According to plaintiff, these hours were reasonably and necessarily expended in order to achieve a successful result in this "hard fought" litigation. *See Copeland v. Marshall*, 641 F.2d 880, 904 (D.C. Cir. 1980). Unfortunately, the ordinary difficulties of determining whether the hours claimed in a fee petition are appropriate have been compounded in this case by the fact that another judge presided at trial and then recused himself when the Court of Appeals remanded the case. Perhaps in anticipation of these difficulties, plaintiff's counsel have provided the court with an unusually well-detailed and documented fee petition that demonstrates that plaintiff is entitled to compensation for all of the hours claimed.

Plaintiff's first application divides the work performed into four "phases"; defendants have adopted this framework in responding to her application. The total number of hours spent during each phase are documented in Exhibits B and C to plaintiff's first application. These exhibits are detailed chronological summaries of all attorney, law clerk and paralegal time compiled from contemporaneously recorded time sheets. They show the date each service was rendered, the amount of time spent on each date, the name of the person performing the service and a description of the work performed. These exhibits comply fully with the documentation requirements established by the Court of Appeals. *See National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327-28 (D.C. Cir. 1982).

This Memorandum will consider the hours claimed for each phase in light of the work performed. In the first phase of the litigation, plaintiff's counsel interviewed their client, did legal research to determine if she had a valid claim, reviewed the administrative decision, ex-

hausted administrative remedies and drafted a thirteen page complaint with a detailed recitation of factual and legal theories. Plaintiff's claim for compensation for 32 hours of attorney work and 11 hours of law clerk work during this phase is entirely reasonable. There is no merit to the defendants' assertion that the time claimed should be reduced by 22 hours because the plaintiff's attorneys spent some time researching Office of Human Rights claims and because the complaint contained a claim under 42 U.S.C. § 1983. Plaintiff's reply notes that practically no time was spent in researching these claims. *See* Plaintiff's Reply to Defendants' Opposition to the Interim Fee Application at 7 ("Plaintiff's First Reply"). Moreover, plaintiff's counsel have represented to the Court that they have attempted to eliminate any claim for time specifically attributable to these claims. *See* Plaintiff's First Application at 42, n.40. Finally, the courts have repeatedly emphasized that a fee claim should not be reduced simply because the prevailing plaintiff explored and pursued alternative legal theories, not all of which were successful. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 435-36 (1983). Accordingly, plaintiff is entitled to compensation for all 43 hours claimed in Phase One of the litigation.

Phase Two of the case encompasses the period from July 12, 1983 through October 3, 1984 during which the parties engaged in discovery, motions practice and a five day trial in the District Court. At the outset of the litigation, plaintiff was required to respond to a Motion to Dismiss or in the Alternative, for Summary Judgment which denied the existence of the sexual relationship that formed the basis of the plaintiff's claim. The plaintiff's opposition to this motion included the affidavits of several witnesses attesting to the existence of the relationship. Following the denial of the defendants' motion, the parties engaged in extensive discovery including 21 depositions. This discovery required court intervention on several occasions. *See* Plaintiff's First Application at 22-

24. During the trial, plaintiff called thirteen witnesses and the defendants called nine. Post-Trial briefs were prepared at the direction of the Court. Following the District Court's Judgment for the defendants, the plaintiff filed a Motion to Alter or Amend and responded to a Motion for an Award of Costs filed by the defendants.

Plaintiff seeks compensation for 843 hours of attorney time and 231.25 hours of law clerk or paralegal time expended in this second phase of the litigation. While she acknowledges that this request is for a substantial amount of time, plaintiff suggests that much of this effort was merely in response to the litigation strategies of the defendants. A considerable portion of plaintiff's first application is devoted to supporting the claim that the defendants "strenuously contested virtually every aspect of plaintiff's case to the point of fabricating facts and alternative explanations for the disputed promotion," *see* Plaintiff's First Application at 9, and that this conduct required Mrs. King's attorneys to perform additional work. For example, plaintiff alleges that defendants initially claimed that one George Holland selected the employee for the disputed job. Later discovery proved that this was not the case. Plaintiff also alleges that defendants frequently changed their position as their earlier allegations proved false, thereby requiring further efforts on the part of plaintiff's counsel. These allegations are well documented by references to the record which support the contention that defendants' own conduct is partly responsible for the amount of time expended in litigating this case.

Despite this strong showing, defendants decline to respond to the evidence marshalled by the plaintiff in support of her claim that the case was bitterly contested. Instead, defendants note only that the plaintiff's claim for hours spent in Phase Two amounts to almost 23 work weeks and suggest that the claim is therefore "outrageous." *See* Defendants' Opposition to Plaintiff's Interim

Application at 9 ("Defendants' First Opposition.") Nonetheless, defendants' two and a half page response to the plaintiff's claim fails to identify any significant work performed by the plaintiff which was unnecessary or duplicitous. Instead, the defendants rely on a few out of context quotations from the trial transcript and an allegation that the plaintiff "spent five trial days building a record for appeal." *Id.* at 9. This latter allegation is more remarkable for the fact that plaintiff lost in the district court only to prevail on appeal. Without further explanation, defendants' efforts to reduce the fee request by indicating with an asterisk which hours it "believe[s] were duplicitous and excessive" must be rejected. *See* Exhibit 1 to Defendants' First Opposition; Defendants' First Opposition at 6 n.1; *id.* at 10 n.4; *id.* at 21 n.7. *See Concerned Veterans*, 675 F.2d at 1337-38 (Tamm, J., concurring); *Donnell v. United States*, 682 F.2d 240, 250 (D.C. Cir. 1982), *cert. denied*, 459 F.2d 1204 (1983). Accordingly, plaintiff is entitled to compensation for all 1074.25 hours expended in Phase Two.

Phase Three of the litigation involved proceedings before the United States Court of Appeals from October 4, 1984 through November 6, 1985. During this phase, plaintiff's counsel conferred with their client, researched possible grounds for appeal, organized the factual record, prepared a brief and appendix, analyzed the defendants' brief and prepared an opposition, engaged in communications with counsel for *amici* who entered the case, prepared and filed a supplemental brief, and prepared for and attended oral argument. Plaintiff requests compensation for 537.75 attorney and 75.75 law clerk or paralegal hours expended during this phase of the case.

Defendants suggest that this request should be reduced by 64.75 hours, apparently because "[a] substantial portion of this time was spent in office conferences and various and saundry (sic) telephone calls" and in " 'reading and digesting' the trial transcripts." *See* Defendants'

First Opposition at 10. There is no support for the suggestion that attorneys engaged in appellate litigation are not entitled to compensation for time so spent. The appropriateness of discussing the issues with associates or reviewing the trial transcripts seems beyond good faith questioning. All of the hours claimed for Phase Three will therefore be compensated.

Phase Four of the litigation lasted from December 13, 1985 to February 28, 1986 and concerned defendants' petition for rehearing and the remand to the district court. Plaintiff seeks compensation for 232 hours of attorney, law clerk or paralegal work relating to the petition for rehearing and to a motion filed by the United States for an extension of time to file an *amicus* brief, research relating to plaintiff's right to a retroactive promotion/back pay, work on the retaliation and work environment claims and preparation of the fee petition.

Defendants assert that plaintiff is not entitled to *any* fees incurred during this phase of the litigation because no opposition to the petition for rehearing was ever filed and because no opposition to the United States' Motion for an Enlargement of Time was required. As plaintiff notes in her reply, few of the hours expended in Phase Four related to these matters and the modest efforts which were undertaken (approximately six hours) were fully compensable. Since defendants make no effort to contest the remaining hours, all 232 hours will be compensated.[3]

In order to determine the appropriate lodestar figure, the number of hours reasonably expended on the litigation must be multiplied by the reasonable hourly rate. *See Copeland*, 641 F.2d at 890-91. In considering the number of hours reasonably expended, the Court should

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[3] Defendants' contention that no award is appropriate for time spent on the hostile work environment and retaliation claims because plaintiff did not prevail on these claims is discussed *infra* at 15-16.

ensure that the attorneys exercised "billing judgment," that is, that they made a "good faith effort to exclude from [the] fee request hours that are excessive, redundant, or otherwise unnecessary . . . ." *Hensley v. Eckerhart*, 461 U.S. at 434; *see Copeland*, 641 F.2d at 891. The chronological summary of work performed by the plaintiff's attorneys, *see* Exhibits B and C to the Plaintiff's First Application, reveals that the hours spent were reasonable and necessary to the prosecution of this case. There is no evidence that plaintiff's attorneys assigned two or three attorneys to any tasks that could reasonably have been accomplished by only one. To the contrary, plaintiff's attorneys made extensive use of paralegal and law clerk time thereby decreasing the number of attorney hours necessary. The fact that plaintiff's attorneys have voluntarily excluded from this application a total of 12 hours of attorney and 37.25 hours of paralegal time that was not productive provides further evidence of "billing judgment." *See* Plaintiff's First Application at 42; Plaintiff's First Reply at 7. Moreover, as discussed in detail above, none of the defendants' articulated objections to the plaintiff's time sheets are persuasive. The Court therefore finds that the 1,613.00 attorney hours and the 350.50 law clerk or paralegal hours should be included in the calculation of the "lodestar."

The appropriate hourly rate for plaintiff's attorneys' services must be determined by examining the "market rates" for similar services in the same locality. *See Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 12-13 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). The Court of Appeals has determined that the best evidence of this market rate is the rate actually charged by the law firm to other fee paying clients during the relevant period, as long as these rates are regularly charged for performing similar work and the rates fall "within the rates charged by other firms for similar work in the same community." *See, e.g., id.*, at 24-25. Here, plaintiff seeks

compensation for all hours worked at her lawyers' 1986 billing rates which were:

Name	Rate
Robert M. Adler	$135
David Albert Mustone	100
Alan B. Frankle	100
James A. Michaels	100
Law Clerks/paralegal	35

The use of current billing rates to compensate for delay in payment has been approved by the Court of Appeals as long as the hourly rates requested do not reflect an increment for the expected delay in payment and do not result in a windfall to the plaintiff's attorneys. *See Murray v. Weinberger*, 741 F.2d 1423, 1433 (D.C. Cir. 1984). Mr. Adler's affidavit, which states that his firm rarely accepts contingent fee work and uses uniform billing rates that "are based on the expectation that clients' bills will be paid promptly," demonstrates that the rates requested do not contemplate substantial delay. *See* Affidavit of Robert M. Adler at ¶ 8, attached to Plaintiff's First Application. Moreover, the firm's current rates do not reflect an unusual increase since the start of the litigation in 1983. The rates charged by the firm to Mrs. King and other clients during the course of litigation are as follows:

Dates		
3/11/83-2/29/84	Partner	$100
	Associate	70
	Law Clerk & Paralegal	25
3/1/84-5/1/85	Partner	$135
	Associate	85
	Law Clerk & Paralegal	35
5/1/85-6/1/86	Partner	$135
	Associate	100
	Law Clerk & Paralegal	35

See Attachment 15 to Plaintiff's First Application, Supplemental Affidavit of Robert M. Adler at ¶ 16, Exhibits D and E, attached to Plaintiff's First Reply. It should be noted that the plaintiff has foregone any claim for compensation for Mr. Adler's time at the $150 per hour rate which has been in effect since June 1, 1986. *See* Plaintiff's Supplemental Application at 17, n.14. In view of the unremarkable increases in the plaintiff's attorneys' rates and the plaintiff's voluntary use of the partner rates applicable before June, 1986, the use of "current" rates as requested by the plaintiff will not result in any windfall to her attorneys.

Plaintiff's attorneys have represented that other clients are regularly billed at these hourly rates. *See* Affidavit of Robert M. Adler, at ¶¶ 8-9, attached to Plaintiff's First Application. Moreover, the rates are entirely reasonable when compared with the rates charged by other firms in the community for similar work. *See, e.g., Laffey*, 572 F. Supp. at 371-72. The reasonableness of these rates has not been contested by the defendants and they will therefore be approved.

When compensated at these hourly rates, the plaintiff's application yields a lodestar of $198,837.50. *See* Attachment A. In addition to this amount, plaintiff seeks a 35% upward adjustment to this figure based on the risk of not prevailing, *see, e.g., Copeland*, 641 F.2d at 892, and a 10% upward adjustment for exceptional results, *see e.g., id.* at 893.[4]

In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3088 (1986), the Supreme Court requested reargument on the question whether attorneys' fees chargeable to a losing defendant may be enhanced based on risk of loss, and if so, to what extent. The case was reargued on October 15, 1986, but has not yet been

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[4] Plaintiff has withdrawn her request for an additional 5% increase based on "exceptional performance." *See supra* at n.2.

decided. While no extra award on that basis is therefore appropriate at this time, the Court will retain jurisdiction over this fee petition in order to make such an award if it is authorized by the Supreme Court. There is no question that plaintiff's counsel faced a substantial possibility, at the outset of the litigation, that the suit would be unsuccessful. Plaintiff's case was based on factual allegations of sexual conduct which are difficult to prove under normal circumstances and which were strenuously denied by these defendants. Moreover, the fact that the District of Columbia Office of Human Rights had already made a finding of "no probable cause" before the complaint was filed increased the chance that plaintiff would not find competent counsel to represent her in the District Court litigation. In addition, the case raised several novel legal issues, most importantly, whether a Title VII plaintiff could establish a cause of action based on the allegation that she was passed over for a promotion in favor of another employee who was having an affair with a supervisor. These indicia of risk are corroborated by the affidavits of several attorneys who represent plaintiffs in employment litigation which indicate that their firms would not have agreed to represent Mrs. King on a contingent fee basis. *See* Affidavit of George M. Chuzi, Declaration of Robert Fitzpatrick, Declaration of David R. Cashdan, attached to Plaintiff's First Reply. This substantial risk of not prevailing was borne almost entirely by the plaintiff's attorneys; an agreement between plaintiff and Mr. Adler provided that plaintiff would be responsible for only $5,000 in fees with any remaining fees to be paid from a court ordered award. *See* Exhibit A, Attachment 15 to Plaintiff's First Application. A 15% bonus for the risk of not prevailing would therefore be appropriate in the event that such an award is authorized by the Supreme Court.

Plaintiff's claim for a 10% bonus based on exceptional success is more difficult to evaluate. While the law in this Circuit authorizes such an award in appropriate cases,

see, e.g., Copeland, 641 F.2d at 894, *Delaware Valley Citizen's Council*, *supra*, which reversed an enhancement based on "superior performance," casts some doubt on the continuing validity of this practice. In any case, the facts here do not warrant such an award, assuming it is permissible. There is no doubt that plaintiff's victory in this case was a substantial one.[5] However, the remedy accorded to the plaintiff by the Court (i.e. reinstatement and back pay) is typical of the relief awarded to prevailing parties in Title VII cases. Furthermore, plaintiff's contention that the Court of Appeals' decision represents a significant advancement in the Title VII context is not completely accurate. As Judge Bork noted in his comment to the order denying rehearing *en banc*, the defendants did not challenge the application of Title VII to the facts of this case on appeal. *See* 778 F.2d at 883. Under these circumstances, the Court can not say that the result in this case was so exceptional as to merit an increase in the lodestar.

In addition to her claim for attorneys' fees, plaintiff also requests reimbursement of $11,489 in costs or expenses. These costs are normally billed to the firm's clients and are not absorbed as overhead by the firm. *See Laffey*, 746 F.2d at 30. This request is supported by copies of receipts, vouchers and other supporting documentation. *See* Affidavit of Robert M. Adler at ¶ 15, Exhibit A, Attachments 1-14 to Plaintiff's First Application. Defendants suggest that only those costs recoverable under 28 U.S.C. § 1920 should be reimbursed. No authority is cited in support of this suggestion and it is not, in fact, the law in this Circuit. *See Laffey*, 746 F.2d at 30. All of plaintiff's claimed expenses except the $10.00 parking ticket will therefore be reimbursed.

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[5] Plaintiff's lawyers estimate that her total dollar recovery, including back pay and increased benefits, will be between $134,899.74 and $166,093.42 depending on her retirement age. *See* Plaintiff's Submission on her Dollar Amount Recovery at 7. These figures have not been reduced to present value.

II.

Plaintiff's supplemental application for an award of fees remains to be considered. This application was filed on October 22, 1987, and seeks an additional $39,862.75 in fees and expenses incurred between March 1, 1986 and October 20, 1986.[6] A reply to this Supplemental Application filed November 18, 1986, requests $2,360.36 in fees and expenses incurred after October 20, 1986. The Supplemental Application is accompanied by a detailed chronological summary of all time billed and by extensive documentation of all expenses. *See* Exhibits A, F, and H to Plaintiff's Supplemental Application.

During this time, plaintiff's counsel prepared a motion detailing the specific relief requested by plaintiff, completed her initial application for attorneys' fees and replied to defendants' opposition, attended four status calls, prepared for and attended a hearing before the Court on June 6, 1986, prepared and filed further pleadings on the *Day v. Matthews* issue, drafted and filed (at the suggestion of the Court) a submission on the dollar amount recovered by the plaintiff, engaged in settlement discussions with the defendants on the retaliation and work environment issues, began preparations for the August 5 trial and drafted a proposed stipulation and order disposing of these issues.

Defendants assert that no compensation is available for the time spent on the hostile work environment and retaliation issues. As to hours spent on these claims *before* the remand from the Court of Appeals, plaintiff is entitled to compensation because the claims were not "fractionable" from the retroactive promotion and back pay claims on which she clearly prevailed. All of these claims involved a common core of facts and were legally related. This is not a case where "counsel's work on one claim

[6] By an Order dated February 27, 1987, the Court awarded plaintiff a further interim payment of $9,076.50 consisting of those additional fees and expenses which were not contested by the defendants.

[was] unrelated to his work on another claim." *Hensley v. Eckerhart*, 461 U.S. at 435. Instead, it is an example of a case where "[m]uch of counsel's time [was] devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.* at 435. As the Supreme Court has stated, in such a case, "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* There can be no doubt that in this case plaintiff achieved very significant relief, *see supra* at n.5, and that the hours expended by her attorneys were reasonable in light of the vigorous defense mounted by the District of Columbia, *see supra* at 9.

Hours spent on these claims after the remand from the Court of Appeals are more obviously "fractionable." [7] Nonetheless, the Court finds that under the terms of the Stipulation, plaintiff has substantially achieved the relief sought on these claims and that this relief was the result of her lawsuit. *See Commissioners Court of Medina County, Texas v. United States*, 683 F.2d 435, 440 (D.C. Cir. 1982). This stipulation provides that James F. Palmer (the Director of the Department of Corrections), his successor and supervisory employees, will not subject Mrs. King to retaliation or reprisals for the filing of her EEOC grievance or the complaint in this case. Should there be a violation of this agreement, Mrs. King is entitled under the terms of the Stipulation to seek relief in this Court after exhausting administrative remedies without filing a new complaint in the Office of Human Rights or in this Court. With respect to the hostile work environment issue, the stipulation provides

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[7] It should be noted that work spent on these two claims constituted only a small percentage of time expended after March 1, 1987 (5%). Mr. Adler spent seven hours on these claims and his associate, Ms. Costigan, spent seven hours. *See* Plaintiff's Reply to Defendants' Opposition to Plaintiff's Supplemental Application at 4 ("Plaintiff's Second Reply").

that the Department of Corrections, its supervisors and employees, will not allow a work environment to exist wherein a sexual relationship between other employees has a substantial impact on Mrs. King or her employment, or interferes with Mrs. King's work performance or creates an intimidating, hostile or offensive work environment. The Order accompanying the Stipulation provides that this provision is to survive the dismissal of the claim. Therefore, while plaintiff did not obtain the injunctive relief she sought with respect to these two claims, the Stipulation does grant her significant advantages in the event that further litigation on these issues becomes necessary. It is highly doubtful that the defendants would have agreed to this relief absent the lawsuit.

Defendants have not challenged the great majority of the hours billed by plaintiff's attorneys in the Supplemental Application. *See supra* at n.7. All of these hours will therefore be reimbursed, including all hours expended in preparing a reply to defendants' opposition to plaintiff's Supplemental Application.[8] Defendants do, however, challenge plaintiff's request for $1,987.50 paid to Joel P. Bennett, Esq. who acted as an expert consultant on plaintiff's applications for attorneys' fees. Mr. Bennett was retained pursuant to a written fee agreement letter dated February 12, 1986. *See* Exhibit E to Plaintiff's Supplemental Application. He billed the plaintiff's attorneys for a total of 15.9 hours at an hourly rate of $125. It is evident that plaintiff made a concerted effort to limit Mr. Bennett's role to the areas where he would be most useful, i.e., reviewing drafts of plaintiff's memoranda and providing legal citations in response to positions taken by the defendants. In light of these efforts to minimize the cost of Mr. Bennett's services and in view of the fact that plaintiff's well researched and documented applications have been very helpful to the

[8] No multiplier for "result achieved" is appropriate for any work covered in the Supplemental Application.

Court in resolving this request for fees, all amounts paid to Mr. Bennett will be reimbursed.[9]

Finally, defendants have contested several of the plaintiff's charges for xeroxing, long distance telephone calls and word processing. None of these objections is persuasive. Accordingly, plaintiff will be awarded the $2,721.61 requested for expenses incurred after March 1, 1987.

Throughout the litigation of these fee petitions, defendants have maintained that the amount of compensation requested by the plaintiff is "outrageous" in light of the nature of this case. This objection has been reiterated in recent filings despite the Supreme Court's holding in *City of Riverside*, *supra*, that attorneys' fee awards in civil rights cases should not be limited to a proportion of the damages award. *See* Defendants' Response to Plaintiffs' (sic) Submission on her Dollar Amount Recovery at 3; Defendants' Opposition to Plaintiff's Supplemental Application for an Award of Fees and Costs at 2. Defendants' concern over the expense of this lawsuit is well founded; in this regard, it should be noted that plaintiff's attorneys' fees and expenses represent only one part of the full cost of this litigation which also has consumed the time and resources of the defendants, the District Court and the Court of Appeals, and numerous witnesses.

But arbitrarily reducing the recovery to plaintiff's attorneys is not the appropriate solution. Defendants' have failed to demonstrate that the fees and expenses documented in the plaintiff's application were not necessarily incurred in the vindication of Mrs. King's rights and in overcoming the shifting defenses mounted by defendants. Under these circumstances, reducing the compensation to plaintiff's attorneys out of a sense of moral indignation would only increase the likelihood that qualified lawyers will be unavailable in the future to plaintiffs with meritorious claims.

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[9] Plaintiff will also be reimbursed for $87.50 paid for services rendered by Mr. Bennett in connection with plaintiff's reply to the Supplemental Application.

The fact is that lengthy trials and appellate review are expensive procedures. Had the parties negotiated an acceptable settlement at an earlier stage, these expenses could have been avoided. The failure to reach such a settlement can not be blamed entirely on Mrs. King and her attorneys. A letter supplied to the Court by the defendants demonstrates that her lawyers were willing to negotiate as early as October 12, 1983 and that the defendants were advised at that time that failure to do so might result in "substantial attorneys' fees . . . being paid by the District of Columbia taxpayers . . . ." (Attachment 1.) It would therefore be unjust to penalize the plaintiff and her counsel for the unfortunate expense of this law suit. Accordingly, the accompanying order will award the plaintiff the sum of $137,953.28 in fees and expenses (which represents a total award of $232,707.62 in fees and $16,276.37 in expenses reduced by deduction of all sums previously paid in interim awards).

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

Date: June 10, 1987

Attachment A

I. PLAINTIFF'S FIRST APPLICATION

ATTORNEYS' FEES

	Hours	Rate	Total
Partner	722.00	$135	$ 97,470.00
Associate	891.00	100	$ 89,100.00
Law Clerk	350.50	35	$ 12,267.50
TOTAL			$198,837.50
Total Lodestar			$ 198,837.50
Amount Paid			$ −95,937.76
Amount Due			$ 102,899.74

EXPENSES

Total Expenses	$ 11,479.76
Amount Paid	$ −8,787.58
Amount Due	$ 2,692.18

II. PLAINTIFF'S SUPPLEMENTAL APPLICATION

ATTORNEYS' FEES

	Hours	Rate	Total
Partner	191.75	$135	$25,886.25
Associate	106.25	100	$10,625.00
Paralegal	5.00	35	$ 175.00
TOTAL			$36,686.25
Total Lodestar			$ 36,686.25
Amount Paid			$ −7,983.00
Amount Due			$ 28,703.25

EXPENSES

Total Expenses *	$ 4,796.61
Amount Paid	$ −1,138.50
Amount Due	$ 3,658.11

* Including all amounts paid to Joel P. Bennett, Esq.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-1890

MABEL A. KING,

Plaintiff,

v.

JAMES F. PALMER, *et al.*,

Defendants.

ORDER

[Filed Jun. 10, 1987]

Upon consideration of plaintiff's Motion to Alter or Amend Judgment and the defendants' Opposition thereto, it is this 9th day of June, 1987, hereby

ORDERED: that the plaintiff's motion should be, and is hereby, GRANTED; and it is further

ORDERED: that the Memorandum and Order dated April 30, 1987, should be, and are hereby, VACATED; and it is further

ORDERED and ADJUDGED: that for the reasons stated in the accompanying Revised Memorandum, the defendants shall pay to plaintiff the sum of $137,953.28 in fees and expenses (which represents a total award of $232,707.62 in fees and $16,276.37 in expenses before deduction of all sums previously paid in interim awards); and it is further

ORDERED: that the Court will retain jurisdiction over this matter in order to authorize an additional award based on the risk of not prevailing should the Supreme Court indicate that such an award is permissible.

/s/ Louis F. Oberdorfer
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-1980

MABEL A. KING,

Plaintiff,

v.

JAMES F. PALMER, *et al.*,

Defendants.

MEMORANDUM

[Filed Apr. 30, 1987]

This case is currently before the Court on Plaintiff's Application for an Interim Award of Attorneys' Fees and Costs Incurred Through February 28, 1986 ("Plaintiff's First Application") and Plaintiff's Supplemental Application for an Award of Attorneys' Fees and Costs ("Plaintiff's Supplemental Application"). Plaintiff's first application for fees was filed on March 20, 1986; defendant filed an opposition on April 18, 1986, and plaintiff replied to that opposition on April 25, 1986. Following a hearing on June 6, 1986, plaintiff was awarded interim fees that were limited to "the core of attorneys' fees and costs that are not seriously contested," *see* Memorandum of June 11, 1986 at 6-7, and consideration of the remaining portion of the fee request was postponed until the Supreme Court decided the then pending case of *City of Riverside v. Rivera*, 106 S. Ct. 2686 (1986). That case was decided on June 27, 1986. In addition, the parties settled the outstanding retaliation and hostile work environment claims on July 10, 1986 and have now thoroughly briefed all matters relating to attorneys' fees

for work performed after March 1, 1986. Accordingly, this Memorandum discusses the amount of fees appropriately available to the plaintiff as the prevailing party in this Title VII litigation. *See* 42 U.S.C. § 2000e-5(k).[1]

I.

The Plaintiff's Application for an Interim Award of Fees requests $198.837.50 in fees; a multiplier of $78,609.38 (for the risk of not prevailing and exceptional success and performance by counsel) and costs of $11,489.00 for a total of $288,935.88.[2] Interim fees of $95,937.76 and costs of $8,787.58 have already been awarded on this application. *See* Memorandum of June 11, 1986. This section discusses 1) the hours reasonably spent, 2) the appropriate hourly rate, 3) the appropriateness of a multiplier, and 4) the expenses which are compensable.

Plaintiff's first application seeks compensation for a total of 1,963.50 lawyer or paralegal hours spent in prosecution of her claim from March 11, 1983 through Febru-

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[1] That statute provides, in part,

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

[2] The Memorandum filed March 20, 1986 requested a total of $314,650.00 in attorneys' fees and expenses. However, on April 15, 1987, plaintiff filed a further pleading which notified the Court of mathematical and interpolitive errors in the March 20, 1986 submission. Correction of these errors by plaintiff's counsel has reduced the number of hours for which compensation is requested. All of the figures used in the remainder of this memorandum are taken from plaintiff's April 15, 1987 and April 16, 1987 corrected submissions.

In addition, plaintiff has also withdrawn her request for an increase based on "exceptional performance" of her counsel in light of *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 106 S. Ct. 3088 (1986). *See* Plaintiff's Supplemental Application at 2, n.1; *id.* at 24, n.19. Plaintiff still requests a 10% multiplier based on "exceptional success." *See infra* at 12-14.

ary 28, 1986. According to plaintiff, these hours were reasonably and necessarily expended in order to achieve a successful result in this "hard fought" litigation. *See Copeland v. Marshall*, 641 F.2d 880, 904 (D.C. Cir. 1980). Unfortunately, the ordinary difficulties of determining whether the hours claimed in a fee petition are appropriate have been compounded in this case by the fact that another judge presided at trial and then recused himself when the Court of Appeals remanded the case. Perhaps in anticipation of these difficulties, plaintiff's counsel have provided the court with an unusually well-detailed and documented fee petition that demonstrates that plaintiff is entitled to compensation for all of the hours claimed.

Plaintiff's first application divides the work performed into four "phases"; defendants have adopted this framework in responding to her application. The total number of hours spent during each phase are documented in Exhibits B and C to plaintiff's first application. These exhibits are detailed chronological summaries of all attorney, law clerk and paralegal time compiled from contemporaneously recorded time sheets. They show the date each service was rendered, the amount of time spent on each date, the name of the person performing the service and a description of the work performed. These exhibits comply fully with the documentation requirements established by the Court of Appeals. *See National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327-28 (D.C. Cir. 1982).

This Memorandum will consider the hours claimed for each phase in light of the work performed. In the first phase of the litigation, plaintiff's counsel interviewed their client, did legal research to determine if she had a valid claim, reviewed the administrative decision, exhausted administrative remedies and drafted a thirteen page complaint with a detailed recitation of factual and legal theories. Plaintiff's claim for compensation for 32 hours of attorney work and 11 hours of law clerk work

during this phase is entirely reasonable. There is no merit to the defendants' assertion that the time claimed should be reduced by 22 hours because the plaintiff's attorneys spent some time researching Office of Human Rights claims and because the complaint contained a claim under 42 U.S.C. § 1983. Plaintiff's reply notes that practically no time was spent in researching these claims. *See* Plaintiff's Reply to Defendants' Opposition to the Interim Fee Application at 7 ("Plaintiff's First Reply"). Moreover, plaintiff's counsel have represented to the Court that they have attempted to eliminate any claim for time specifically attributable to these claims. *See* Plaintiff's First Application at 42, n.40. Finally, the courts have repeatedly emphasized that a fee claim should not be reduced simply because the prevailing plaintiff explored and pursued alternative legal theories, not all of which were successful. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 435-36 (1983). Accordingly, plaintiff is entitled to compensation for all 43 hours claimed in Phase One of the litigation.

Phase Two of the case encompasses the period from July 12, 1983 through October 3, 1984 during which the parties engaged in discovery, motions practice and a five day trial in the District Court. At the outset of the litigation, plaintiff was required to respond to a Motion to Dismiss or in the Alternative, for Summary Judgment which denied the existence of the sexual relationship that formed the basis of the plaintiff's claim. The plaintiff's opposition to this motion included the affidavits of several witnesses attesting to the existence of the relationship. Following the denial of the defendants' motion, the parties engaged in extensive discovery including 21 depositions. This discovery required court intervention on several occasions. *See* Plaintiff's First Application at 22-24. During the trial, plaintiff called thirteen witnesses and the defendants called nine. Post-Trial briefs were prepared at the direction of the Court. Following the District Court's Judgment for the defendants, the plain-

tiff filed a Motion to Alter or Amend and responded to a Motion for an Award of Costs filed by the defendants.

Plaintiff seeks compensation for 843 hours of attorney time and 231.25 hours of law clerk or paralegal time expended in this second phase of the litigation. While she acknowledges that this request is for a substantial amount of time, plaintiff suggests that much of this effort was merely in response to the litigation strategies of the defendants. A considerable portion of plaintiff's first application is devoted to supporting the claim that the defendants "strenuously contested virtually every aspect of plaintiff's case to the point of fabricating facts and alternative explanations for the disputed promotion," *see* Plaintiff's First Application at 9, and that this conduct required Mrs. King's attorneys to perform additional work. For example, plaintiff alleges that defendants initially claimed that one George Holland selected the employee for the disputed job. Later discovery proved that this was not the case. Plaintiff also alleges that defendants frequently changed their position as their earlier allegations proved false, thereby requiring further efforts on the part of plaintiff's counsel. These allegations are well documented by references to the record which support the contention that defendants' own conduct is partly responsible for the amount of time expended in litigating this case.

Despite this strong showing, defendants decline to respond to the evidence marshalled by the plaintiff in support of her claim that the case was bitterly contested. Instead, defendants note only that the plaintiff's claim for hours spent in Phase Two amounts to almost 23 work weeks and suggest that the claim is therefore "outrageous." *See* Defendants' Opposition to Plaintiff's Interim Application at 9 ("Defendants' First Opposition.") Nonetheless, defendants' two and a half page response to the plaintiff's claim fails to identify any significant work performed by the plaintiff which was unnecessary or duplicitous. Instead, the defendants rely on a few out of

context quotations from the trial transcript and an allegation that the plaintiff "spent five trial days building a record for appeal." *Id.* at 9. This latter allegation is more remarkable for the fact that plaintiff lost in the district court only to prevail on appeal. Without further explanation, defendants' efforts to reduce the fee request by indicating with an asterisk which hours it "believe[s] were duplicitous and excessive" must be rejected. *See* Exhibit 1 to Defendants' First Opposition; Defendants' First Opposition at 6 n.1; *id.* at 10 n.4; *id.* at 21 n.7. *See Concerned Veterans*, 675 F.2d at 1337-38 (Tamm, J., concurring); *Donnell v. United States*, 682 F.2d 240, 250 (D.C. Cir. 1982), *cert. denied*, 459 F.2d 1204 (1983). Accordingly, plaintiff is entitled to compensation for all 1074.25 hours expended in Phase Two.

Phase Three of the litigation involved proceedings before the United States Court of Appeals from October 4, 1984 through November 6, 1985. During this phase, plaintiff's counsel conferred with their client, researched possible grounds for appeal, organized the factual record, prepared a brief and appendix, analyzed the defendants' brief and prepared an opposition, engaged in communications with counsel for *amici* who entered the case, prepared and filed a supplemental brief, and prepared for and attended oral argument. Plaintiff requests compensation for 537.75 attorney and 75.75 law clerk or paralegal hours expended during this phase of the case.

Defendants suggest that this request should be reduced by 64.75 hours, apparently because "[a] substantial portion of this time was spent in office conferences and various and saundry (sic) telephone calls" and in " 'reading and digesting' the trial transcripts." *See* Defendants' First Opposition at 10. There is no support for the suggestion that attorneys engaged in appellate litigation are not entitled to compensation for time so spent. The appropriateness of discussing the issues with associates or reviewing the trial transcripts seems beyond

good faith questioning. All of the hours claimed for Phase Three will therefore be compensated.

Phase Four of the litigation lasted from December 13, 1985 to February 28, 1986 and concerned defendants' petition for rehearing and the remand to the district court. Plaintiff seeks compensation for 232 hours of attorney, law clerk or paralegal work relating to the petition for rehearing and to a motion filed by the United States for an extension of time to file an *amicus* brief, research relating to plaintiff's right to a retroactive promotion/back pay, work on the retaliation and work environment claims and preparation of the fee petition.

Defendants assert that plaintiff is not entitled to *any* fees incurred during this phase of the litigation because no opposition to the petition for rehearing was ever filed and because no opposition to the United States' Motion for an Enlargement of Time was required. As plaintiff notes in her reply, few of the hours expended in Phase Four related to these matters and the modest efforts which were undertaken (approximately six hours) were fully compensable. Since defendants make no effort to contest the remaining hours, all 232 hours will be compensated.[3]

In order to determine the appropriate lodestar figure, the number of hours reasonably expended on the litigation must be multiplied by the reasonable hourly rate. *See Copeland*, 641 F.2d at 890-91. In considering the number of hours reasonably expended, the Court should ensure that the attorneys exercised "billing judgment," that is, that they made a "good faith effort to exclude from [the] fee request hours that are excessive, redundant, or otherwise unnecessary . . . ." *Hensley v. Eckerhart*, 461 U.S. at 434; *see Copeland*, 641 F.2d at 891. The chronological summary of work performed by the

[3] Defendants' contention that no award is appropriate for time spent on the hostile work environment and retaliation claims because plaintiff did not prevail on these claims is discussed *infra* at 15-16.

plaintiff's attorneys, *see* Exhibits B and C to the Plaintiff's First Application, reveals that the hours spent were reasonable and necessary to the prosecution of this case. There is no evidence that plaintiff's attorneys assigned two or three attorneys to any tasks that could reasonably have been accomplished by only one. To the contrary, plaintiff's attorneys made extensive use of paralegal and law clerk time thereby decreasing the number of attorney hours necessary. The fact that plaintiff's attorneys have voluntarily excluded from this application a total of 12 hours of attorney and 37.25 hours of paralegal time that was not productive provides further evidence of "billing judgment." *See* Plaintiff's First Application at 42; Plaintiff's First Reply at 7. Moreover, as discussed in detail above, none of the defendants' articulated objections to the plaintiff's time sheets are persuasive. The Court therefore finds that the 1,613.00 attorney hours and the 350.50 law clerk or paralegal hours should be included in the calculation of the "lodestar."

The appropriate hourly rate for plaintiff's attorneys' services must be determined by examining the "market rates" for similar services in the same locality. *See Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 12-13 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). The Court of Appeals has determined that the best evidence of this market rate is the rate actually charged by the law firm to other fee paying clients during the relevant period, as long as these rates are regularly charged for performing similar work and the rates fall "within the rates charged by other firms for similar work in the same community." *See, e.g., id.*, at 24-25. Here, plaintiff seeks compensation for all hours worked at her lawyers' current billing rates which are:

Name	Rate
Robert M. Adler	$135
David Albert Mustone	100
Alan B. Frankle	100
James A. Michaels	100
Law Clerks/paralegal	35

According to plaintiff, the use of current rather than historic billing rates is justified in order to compensate for some of the "inflationary loss and lost interest to counsel on account of the approximately three-year delay in receiving an award for services." Plaintiff's First Application at 35. While there is some merit to plaintiff's contention, it is now clear that the law requires the use of historic billing rates with no compensation for lost interest or delay. *See Library of Congress v. Shaw*, 106 S. Ct. 2957, 2965 (1986). Accordingly, the iodestar figure will be computed using the rates agreed upon by the plaintiff and her attorneys in the initial fee agreement as modified by later communications advising the plaintiff of a fee increase. These rates were the rates charged by the plaintiff's law firm to other clients during the relevant period. *See* Attachment 15 to Plaintiff's First Application, Supplemental Affidavit of Robert M. Adler at ¶ 16, Exhibits D and E, attached to Plaintiff's First Reply. The following rates will be applicable to the first fee petition:

Dates		
3/11/83-2/29/84	Partner	$100
	Associate	70
	Law Clerk & Paralegal	25
3/1/84-5/1/85	Partner	$135
	Associate	85
	Law Clerk & Paralegal	35
after 5/1/85	Partner	$135
	Associate	100
	Law Clerk & Paralegal	35

Plaintiff's attorneys have represented that other clients were regularly billed at these hourly rates. *See* Affidavit of Robert M. Adler, at ¶¶ 8-9, attached to Plaintiff's First Application. Moreover, the rates are entirely reasonable when compared with the rates charged by other firms in the community for similar work. *See, e.g., Laffey*, 572 F. Supp. at 371-72. The reasonableness of these rates has not been contested by the defendants and they will therefore be approved.

When compensated at these hourly rates, the plaintiff's application yields a lodesar of $179,745.00. *See* Attachment A. In addition to this amount, plaintiff seeks a 35% upward adjustment to this figure based on the risk of not prevailing, *see, e.g., Copeland*, 641 F.2d at 892, and a 10% upward adjustment for exceptional results, *see, e.g., id.* at 893.[4]

In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3088 (1986), the Supreme Court requested reargument on the question whether attorneys' fees chargeable to a losing defendant may be enhanced based on risk of loss, and if so, to what extent. The case was reargued on October 15, 1986, but has not yet been decided. While no extra award on that basis is therefore appropriate at this time, the Court will retain jurisdiction over this fee petition in order to make such an award if it is authorized by the Supreme Court. There is no question that plaintiff's counsel faced a substantial possibility, at the outset of the litigation, that the suit would be unsuccessful. Plaintiff's case was based on factual allegations of sexual conduct which are difficult to prove under normal circumstances and which were strenuously denied by these defendants. Moreover, the fact that the District of Columbia Office of Human Rights had already made a finding of "no probable cause" before the complaint was filed increased the chance that

[4] Plaintiff has withdrawn her request for an additional 5% increase based on "exceptional performance." *See supra* at n.2.

plaintiff would not find competent counsel to represent her in the District Court litigation. In addition, the case raised several novel legal issues, most importantly, whether a Title VII plaintiff could establish a cause of action based on the allegation that she was passed over for a promotion in favor of another employee who was having an affair with a supervisor. These indicia of risk are corroborated by the affidavits of several attorneys who represent plaintiffs in employment litigation which indicate that their firms would not have agreed to represent Mrs. King on a contingent fee basis. *See* Affidavit of George M. Chuzi, Declaration of Robert Fitzpatrick, Declaration of David R. Cashdan, attached to Plaintiff's First Reply. This substantial risk of not prevailing was borne almost entirely by the plaintiff's attorneys; an agreement between plaintiff and Mr. Adler provided that plaintiff would be responsible for only $5,000 in fees with any remaining fees to be paid from a court ordered award. *See* Exhibit A, Attachment 15 to Plaintiff's First Application. A %15 bonus for the risk of not prevailing would therefore be appropriate in the event that such an award is authorized by the Supreme Court.

Plaintiff's claim for a 10% bonus based on exceptional success is more difficult to evaluate. While the law in this Circuit authorizes such an award in appropriate cases, *see, e.g., Copeland*, 641 F.2d at 894, *Delaware Valley Citizen's Council*, *supra*, which reversed an enhancement based on "superior performance," casts some doubt on the continuing validity of this practice. In any case, the facts here do not warrant such an award, assuming it is permissibie. There is no doubt that plaintiff's victory in this case was a substantial one.[5] How-

[5] Plaintiff's lawyers estimate that her total dollar recovery, including back pay and increased benefits, will be between $134,899.74 and $166,093.42 depending on her retirement age. *See* Plaintiff's Submission on her Dollar Amount Recovery at 7. These figures have not been reduced to present value.

ever, the remedy accorded to the plaintiff by the Court (i.e. reinstatement and back pay) is typical of the relief awarded to prevailing parties in Title VII cases. Furthermore, plaintiff's contention that the Court of Appeals' decision represents a significant advancement in the Title VII context is not completely accurate. As Judge Bork noted in his comment to the order denying rehearing *en banc*, the defendants did not challenge the application of Title VII to the facts of this case on appeal. *See* 778 F.2d at 883. Under these circumstances, the Court can not say that the result in this case was so exceptional as to merit an increase in the lodestar.

In addition to her claim for attorneys' fees, plaintiff also requests reimbursement of $11,489 in costs or expenses. These costs are normally billed to the firm's clients and are not absorbed as overhead by the firm. *See Laffey*, 746 F.2d at 30. This request is supported by copies of receipts, vouchers and other supporting documentation. *See* Affidavit of Robert M. Adler at ¶ 15, Exhibit A, Attachments 1-14 to Plaintiff's First Application. Defendants suggest that only those costs recoverable under 28 U.S.C. § 1920 should be reimbursed. No authority is cited in support of this suggestion and it is not, in fact, the law in this Circuit. *See Laffey*, 746 F.2d at 30. All of plaintiff's claimed expenses except the $10.00 parking ticket will therefore be reimbursed.

II.

Plaintiff's supplemental application for an award of fees remains to be considered. This application was filed on October 22, 1987, and seeks an additional $39,862.75 in fees and expenses incurred between March 1, 1986 and October 20, 1986.[6] A reply to this Supplemental

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[6] By an Order dated February 27, 1987, the Court awarded plaintiff a further interim payment of $9,076.50 consisting of those additional fees and expenses which were not contested by the defendants.

Application filed November 18, 1986, requests $2,360.36 in fees and expenses incurred after October 20, 1986. The Supplemental Application is accompanied by a detailed chronological summary of all time billed and by extensive documentation of all expenses. *See* Exhibits A, F, and H to Plaintiff's Supplemental Application.

During this time, plaintiff's counsel prepared a motion detailing the specific relief requested by plaintiff, completed her initial application for attorneys' fees and replied to defendants' opposition, attended four status calls, prepared for and attended a hearing before the Court on June 6, 1986, prepared and filed further pleadings on the *Day v. Matthews* issue, drafted and filed (at the suggestion of the Court) a submission on the dollar amount recovered by the plaintiff, engaged in settlement discussions with the defendants on the retaliation and work environment issues, began preparations for the August 5 trial and drafted a proposed stipulation and order disposing of these issues.

Defendants assert that no compensation is available for the time spent on the hostile work environment and retaliation issues. As to hours spent on these claims *before* the remand from the Court of Appeals, plaintiff is entitled to compensation because the claims were not "fractionable" from the retroactive promotion and back pay claims on which she clearly prevailed. All of these claims involved a common core of facts and were legally related. This is not a case where "counsel's work on one claim [was] unrelated to his work on another claim." *Hensley v. Eckerhart*, 461 U.S. at 435. Instead, it is an example of a case where "[m]uch of counsel's time [was] devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.* at 435. As the Supreme Court has stated, in such a case, "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended

on the litigation." *Id.* There can be no doubt that in this case plaintiff achieved very significant relief, *see supra* at n.5, and that the hours expended by her attorneys were reasonable in light of the vigorous defense mounted by the District of Columbia, *see supra* at 9.

Hours spent on these claims after the remand from the Court of Appeals are more obviously "fractionable." [7] Nonetheless, the Court finds that under the terms of the Stipulation, plaintiff has substantially achieved the relief sought on these claims and that this relief was the result of her lawsuit. *See Commissioners Court of Medina County, Texas v. United States*, 683 F.2d 435, 440 (D.C. Cir. 1982). This stipulation provides that James F. Palmer (the Director of the Department of Corrections), his successor and supervisory employees, will not subject Mrs. King to retaliation or reprisals for the filing of her EEOC grievance or the complaint in this case. Should there be a violation of this agreement, Mrs. King is entitled under the terms of the Stipulation to seek relief in this Court after exhausting administrative remedies without filing a new complaint in the Office of Human Rights or in this Court. With respect to the hostile work environment issue, the stipulation provides that the Department of Corrections, its supervisors and employees, will not allow a work environment to exist wherein a sexual relationship between other employees has a substantial impact on Mrs. King or her employment, or interferes with Mrs. King's work performance or creates an intimidating, hostile or offensive work environment. The Order accompanying the Stipulation provides that this provision is to survive the dismissal of the claim. Therefore, while plaintiff did not obtain the injunctive

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[7] It should be noted that work spent on these two claims constituted only a small percentage of time expended after March 1, 1987 (5%). Mr. Adler spent seven hours on these claims and his associate, Ms. Costigan, spent seven hours. *See* Plaintiff's Reply to Defendants' Opposition to Plaintiff's Supplemental Application at 4 ("Plaintiff's Second Reply").

relief she sought with respect to these two claims, the Stipulation does grant her significant advantages in the event that further litigation on these issues becomes necessary. It is highly doubtful that the defendants would have agreed to this relief absent the lawsuit.

Defendants have not challenged the great majority of the hours billed by plaintiff's attorneys in the Supplemental Application. *See supra* at n.7. All of these hours will therefore be reimbursed, including all hours expended in preparing a reply to defendants' opposition to plaintiff's Supplemental Application.[8] Defendants do, however, challenge plaintiff's request for $1,987.50 paid to Joel P. Bennett, Esq. who acted as an expert consultant on plaintiff's applications for attorneys' fees. Mr. Bennett was retained pursuant to a written fee agreement letter dated February 12, 1986. *See* Exhibit E to Plaintiff's Supplemental Application. He billed the plaintiff's attorneys for a total of 15.9 hours at an hourly rate of $125. It is evident that plaintiff made a concerted effort to limit Mr. Bennett's role to the areas where he would be most useful, i.e., reviewing drafts of plaintiff's memoranda and providing legal citations in response to positions taken by the defendants. In light of these efforts to minimize the cost of Mr. Bennett's services and in view of the fact that plaintiff's well reseached and documented applications have been very helpful to the Court in resolving this request for fees, all amounts paid to Mr. Bennett will be reimbursed.[9]

Finally, defendants have contested several of the plaintiff's charges for xeroxing, long distance telephone calls and word processing. None of these objections is persuasive. Accordingly, plaintiff will be awarded the $2,721.61 requested for expenses incurred after March 1, 1987.

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[8] No multiplier for "result achieved" is appropriate for any work covered in the Supplemental Application.

[9] Plaintiff will also be reimbursed for $87.50 paid for services rendered by Mr. Bennett in connection with plaintiff's reply to the Supplemental Application.

Throughout the litigation of these fee petitions, defendants have maintained that the amount of compensation requested by the plaintiff is "outrageous" in light of the nature of this case. This objection has been reiterated in recent filings despite the Supreme Court's holding in *City of Riverside, supra,* that attorneys' fee awards in civil rights cases should not be limited to a proportion of the damages award. *See* Defendants' Response to Plaintiffs' (sic) Submission on her Dollar Amount Recovery at 3; Defendants' Opposition to Plaintiff's Supplemental Application for an Award of Fees and Costs at 2. Defendants' concern over the expense of this lawsuit is well founded; in this regard, it should be noted that plaintiff's attorneys' fees and expenses represent only one part of the full cost of this litigation which also has consumed the time and resources of the defendants, the District Court and the Court of Appeals, and numerous witnesses.

But arbitrarily reducing the recovery to plaintiff's attorneys is not the appropriate solution. Defendants' have failed to demonstrate that the fees and expenses documented in the plaintiff's application were not necessarily incurred in the vindication of Mrs. King's rights and in overcoming the shifting defenses mounted by defendants. Under these circumstances, reducing the compensation to plaintiff's attorneys out of a sense of moral indignation would only increase the likelihood that qualified lawyers will be unavailable in the future to plaintiffs with meritorious claims.

The fact is that lengthy trials and appellate review are expensive procedures. Had the parties negotiated an acceptable settlement at an earlier stage, these expenses could have been avoided. The failure to reach such a settlement can not be blamed entirely on Mrs. King and her attorneys. A letter supplied to the Court by the defendants demonstrates that her lawyers were willing to negotiate as early as October 12, 1983 and that the

defendants were advised at that time that failure to do so might result in "substantial attorneys' fees . . . being paid by the District of Columbia taxpayers . . . ." (Attachment 1.) It would therefore be unjust to penalize the plaintiff and her counsel for the unfortunate expense of this law suit. Accordingly, the accompanying order will award the plaintiff the sum of $118,860.78 in fees and expenses (which represents a total award of $216,431.25 in fees and $16,276.37 in expenses reduced by deduction of all sums previously paid in interim awards).

/s/ Louis F. Oberdorfer
United States District Judge

Date: April 30, 1987

Attachment A

PLAINTIFF'S FIRST APPLICATION

ATTORNEYS' FEES

I. March 11, 1983 through February 29, 1984

	Hours	Rate	Total
Partner	70.00	$100	$ 7,000.00
Associate	321.00	70	$22,470.00
Law Clerk	71.25	25	$ 1,781.25
TOTAL			$31,251.25

II. March 1, 1984 through April 30, 1985

	Hours	Rate	Total
Partner	526.75	$135	$ 71,111.25
Associate	420.00	85	$ 35,700.00
Law Clerk	246.75	35	$ 8,636.25
TOTAL			$115,447.50

III. May 1, 1985 through February 28, 1986

	Hours	Rate	Total
Partner	125.25	$135	$16,908.75
Associate	150.00	100	$15,000.00
Law Clerk	32.50	35	$ 1,137.50
TOTAL			$33,046.25

Total Lodestar:	$ 31,251.25
	$ 115,447.50
	$ 33,046.25
	$ 179,745.00
Amount Due:	$ 179,745.00
	$—95,937.76
	$ 83,807.24

EXPENSES

Total Expenses	$ 11,479.76
Amount Paid	$—8,787.58
Amount Due	$ 2,692.18

Attachment A

PLAINTIFF'S SUPPLEMENTAL APPLICATION

ATTORNEYS' FEES

March 1, 1986 through November 18, 1986

	Hours	Rate	Total
Partner	191.75	$135	$25,886.25
Associate	106.25	100	$10,625.00
Paralegal	5.00	35	$ 175.00
TOTAL			$36,686.25

Total Lodestar	$ 36,686.25
Interim Payments	$—7,983.00
Amount Due	$ 28,703.25

EXPENSES

Total Expenses *	$ 4,796.61
Interim Payments	$—1,138.50
Amount Due	$ 3,658.11

* Including all amounts paid to Joel P. Bennett, Esq.

Attachment B

Law Offices
ROBERT M. ADLER
The Flour Mill, Suite 103
1000 Potomac Street, N.W.
Washington, D.C. 20007
Telephone (202) 298-8323

October 12, 1983

Metcalfe C. King, Esquire
Office of the Corporation Counsel
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: King v. James F. Palmer, Director, Department of Corrections

Dear Mr. King:

We have just received a copy of the Opinion of the United States District Court for the District of Delaware in *Toscano* v. *Nimmo* (C.A. No. 82-315-WKS), dated August 31, 1983.

We are enclosing a copy of this Opinion for your information. Therein, on facts similar to the allegations in the *King* matter, the court followed the EEOC regulations upon which we have relied.

I believe this should be helpful in this matter in that you previously have asserted, in your summary judgment papers, that our basic legal premise lacked validity.

In view of this most recent decision, the affidavits we recently filed in this case in opposition to your summary judgment motion, and the Court's almost immediate denial of your motion, I would respectfully suggest that the District of Columbia may wish to reconsider its' continued defense of this case. While this may sound like

a brash proposal, I know based upon personal experience in *Bundy* v. *Jackson* that your office has a penchant for locking itself into a defense of individuals who in fact are later shown not to be credible and that the basic relief sought by the plaintiff is thereafter awarded and substantial attorneys' fees end up being paid by the District of Columbia taxpayers (of which I am one). I would, therefore, urge that, as public servants, your office conduct an *independent* review of your posture in this case.

Sincerely,

/s/ Robert M. Adler
ROBERT M. ADLER

RMA/cs
Enclosure
cc: Mrs. Mabel King

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-1890

MABEL A. KING,

Plaintiff,

v.

JAMES F. PALMER, *et al.*,

Defendants.

ORDER

For the reasons stated in the accompanying memorandum, it is this 30th day of April, 1987, hereby

ORDERED and ADJUDGED: that defendants shall pay to plaintiff the sum of $118,860.78 in fees and expenses (which represents a total award of $216,431.25 in fees and $16,276.37 in expenses before deduction of all sums previously paid in interim awards); and it is further

ORDERED: that the Court will retain jurisdiction over this matter in order to authorize an additional award based on the risk of not prevailing should the Supreme Court indicate that such an award is permissible.

/s/ Louis F. Oberdorfer
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-1980

MABEL A. KING,

Plaintiff,

v.

JAMES F. PALMER, *et al.*,

Defendants.

ORDER

On February 12, 1987, plaintiff moved for a second supplemental award of interim attorneys' fee. Plaintiff notes statements in Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Supplemental Application filed November 10, 1986, and attachments to that Opposition agreeing that plaintiff is entitled to an additional $7,938.00 in legal fees and $1,138.50 in expenses. Defendants have nevertheless opposed the second supplemental petition. The defendants' opposition is not persuasive. Such a further interim fee payment is authorized by *Parker v. Lewis*, 670 F.2d 249 (D.C. Cir. 1982). Accordingly, it is this 27th day of February, 1987, hereby

ORDERED and ADJUDGED: that defendants shall pay to plaintiff a total of $9,076.50.

/s/ Louis F. Oberdorfer
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-1980-LFO

MABEL A. KING,

Plaintiff,

v.

JAMES F. PALMER, *et al.*,

Defendants.

ORDER

[Filed Nov. 30, 1988]

Upon consideration of plaintiff's Motion for Reconsideration of or in the Alternative to Alter or Amend this Court's Memorandum and Order Dated September 20, 1988, defendants' Motion to Alter or Amend the Judgment Dated September 20, 1988, the opposition thereto, and the entire record in this matter, it is this 29th day of November, 1988 hereby

ORDERED: that plaintiff's Motion for Reconsideration of or in the Alternative to Alter or Amend this Court's Memorandum and Order Dated September 20, 1988, and defendants' Motion to Alter or Amend the Judgment Dated September 20, 1988 shall be, and are hereby, DENIED.

/s/ Louis F. Oberdorfer
United States District Judge

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-1980

MABEL A. KING,

Plaintiff,

v.

JAMES F. PALMER, *et al.*,

Defendants.

MEMORANDUM

[Filed Jun. 11, 1986]

Plaintiff, a nurse previously working at the District of Columbia Jail, in this Title VII action sues various officials of the District of Columbia Department of Corrections. She seeks injunctive relief and damages on the theory that she was denied a promotion which was given instead to another nurse who was sexually involved with the doctor who promoted her. By Memorandum of September 10, 1984, the District Court (Gesell, J.), entered judgment for defendants. *See King v. Palmer*, 598 F.Supp. 65 (D.D.C. 1984). The matter now is before this Court on remand from the Court of Appeals. *See King v. Palmer*, 778 F.2d 878 (D.C. Cir. 1985). The Court of Appeals stated:

> we reverse the District Court's holding regarding the promotion and remand the matter to the District Court to enter judgment for Ms. King and to determine an appropriate remedy.

778 F.2d at 882. The Court of Appeals also stated that

> Ms. King also alleged in her complaint and maintained during her trial that she was the victim of a discriminatory work environment and of reprisals for having filed a complaint with the EEOC. The District Court has yet to enter findings of fact or conclusions of law on these allegations. We therefore remand these matters to the District Court for further consideration and entry of appropriate findings, conclusions and judgment.

Id. at 883. With regard to remedy the Court stated:

> At a minimum it appears that the appropriate remedy in this case should include the promotion of Ms. King to the position in question, her receipt of backpay, and a full consideration of any further relief.

Id. at 882 n.7.

Presently before the Court are plaintiff's motion for entry of judgment and for other relief, and her application for an interim award of attorneys' fees. A hearing was conducted on these motions on June 6, 1986.

I.

Plaintiff contends that, in light of the Court of Appeals mandate, "this Court should grant Mrs. King a retroactive promotion to the position of Supervisory Forensic/Clinical Nurse, DS-12, effective September 20, 1981, the date the promotion was granted to Nurse Grant." Memorandum of Points and Authorities in Support of Motion for Entry of Judgment and for Other Relief ("Plaintiff's Memorandum") at 2 (filed April 4, 1986). Plaintiff also contends that she is entitled to backpay reflecting the promotion that should have been granted, together with prejudgment interest thereon.

Plaintiff's contentions are well taken. Although defendants now suggest that a new trial is necessary in order to resolve whether plaintiff (rather than some other applicant) would have in fact received the promotion in the absence of the unlawful, discriminatory conduct, *see Days v. Mathews*, 530 F.2d 1083, 1085 (D.C. Cir. 1976), defendants do not materially dispute that they did *not* press a *Mathews* defense at the original trial of this action. Indeed, it is not materially disputed that defendants *first* attempted to press the *Mathews* defense in their petition for rehearing *en banc* after the Court of Appeals decision of December 13, 1985. *See* Petition of Appellees for Rehearing [or], in the Alternative, for Rehearing En Banc at 4-5 (filed January 15, 1986, in Court of Appeals No. 84-5750). Even with the benefit of defendants' *Mathews* argument, the Court of Appeals denied the petition for rehearing, stating in a *per curiam* order of February 18, 1986, that:

> The suggestion for rehearing *en banc* of appellees has been circulated to the full Court and no member has requested the taking of a vote thereon.

See 778 F.2d at 883. In light of the foregoing, the remand requires entry of judgment for plaintiff and the fashioning of a remedy that "at a minimum [, it appears,] . . . should include the promotion of Ms. King to the position in question, her receipt of backpay, and a full consideration of any further relief." 778 F.2d at 882 n.7.

As discussed at the June 6 hearing, however, it appears that the position plaintiff originally sought no longer exists. Accordingly, the accompanying order will enter judgment for plaintiff and require plaintiff to submit an appropriate proposed order which will require the promotion of plaintiff to a DS-12 position and the award of backpay.

Plaintiff also claims, and is entitled to, prejudgment interest on her backpay award; defendants have not con-

tested a prejudgment interest award should plaintiff receive retroactive promotion and backpay. *See* Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Entry of Judgment and for Other Relief at 6 (filed April 18, 1986). In any event, 42 U.S.C. § 2000e-5(g) authorizes a court to grant a prevailing plaintiff in a private Title VII case such "other equitable relief as the court deems appropriate," and prejudgment interest is necesary to make plaintiff whole. *See Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1102 (D.C. Cir. 1984), *cert. denied* 105 S.Ct. 939 (1985); *Higgins v. State of Oklahoma*, 642 F.2d 1199, 1203 (10th Cir. 1981); *Acosta v. University of District of Columbia*, 528 F. Supp. 1215, 1224 (D.D.C. 1981); *compare Blake v. Califano*, 626 F.2d 891, 895 (D.C. Cir. 1980) ("[A]n award of prejudgment interest would be consistent with the remedial purposes of Title VII," but prejudgment interest may not be awarded against a *federal* employer); *compare also Schneider v. Lockheed Aircraft Corporation*, 658 F.2d 835, 856-57 (D.C. Cir. 1981), *cert. denied* 455 U.S. 994 (1982) (District of Columbia law as codified at D.C. Code § 15-109 does not provide for award of prejudgment interest in tort actions). The denial of plaintiff's use of her money makes such an award appropriate in the circumstances here. Although such interest is authorized by Title VII, the rate of interest on a Title VII judgment against the District of Columbia or its officials is fixed at 4 percent by D.C. Code § 28-3302. *See Turgeon v. Howard University*, 571 F. Supp. 679, 688 (D.D.C. 1983).

Following colloquy with counsel, however, plaintiff's request for further injunctive relief will be denied. The injunctive relief requested would be overly intrusive and largely duplicative of that accomplished by order entered in *Bundy v. Jackson*, No. 78-1359 (D.D.C. March 23, 1981) (Hart, J.) (pursuant to an order of the Court of Appeals, *see Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981)).

II.

Plaintiff has also applied for an interim award of attorneys' fees and expenses for the period up to February 28, 1986. The amounts plaintiff seeks are:

$210,610.00	("lodestar")
$ 65,103.00	(35% upward adjustment for risk)
$ 27,901.00	(15% separate enhancement for "exceptional success and performance")
$ 11,489.00	(costs)
$314,653.00	(Total)

Plaintiff notes that the Court of Appeals in its remand order directed that the Court enter judgment for plaintiff; she also contends, and defendants do not contest, that an interim award of fees may be appropriate while a case is on remand. *See Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 633 (5th Cir. 1983).

Plaintiff has documented the hours spent and the amounts claimed. She attempts to justify the substantial amount of the requested award on the ground, among others, that this litigation was "hard fought," *see Copeland v. Marshall*, 641 F.2d 880, 904 (D.C. Cir. 1980) (*en banc*). Plaintiffs also seeks to justify 35% and 15% enhancement multipliers on the ground that this litigation was especially risky and demanding of plaintiff's counsel and involved novel legal issues. Plaintiff also justifies the use of current billing rates by virtue of the fact that payment of the requested fees comes long after counsel's services were rendered.

In response, defendants argue generally that the hours and amounts claimed by plaintiff are excessive. Defendants contend that plaintiff has not established that she meets the standards for an interim fee award, and that plaintiff's application is flawed for (1) its failure to differentiate hours that were spent on issues that remain to be resolved by the Court; (2) her inclusion of certain hours and expenses necessitated by the preparation of

claims that never went to trial; (3) reliance upon rates that exceed those to which counsel agreed with his client; (4) inclusion of enhancement multipliers that are unjustified because defense counsel conceded the validity of the cause of action (rendering the dispute factual, rather than complexly legal) and because the rates claimed in the application already include a risk compensation factor.

It is neither necessary nor appropriate to delve into the details of the fee controversy at this juncture. The interim award will be limited to the core of attorneys' fees and costs that are not seriously contested. *Cf. Parker v. Lewis*, 670 F.2d 249 (D.C. Cir. 1982). With respect to the remainder of the request, defendants have taken vigorous exception to large segments of plaintiff's fees and cost claim. The services of a magistrate or special master may be required in order to sort out details. Defendants estimate plaintiff's backpay claim to be worth only $26,450. Even allowing prejudgment interest on the backpay award, the $314,000 claim for attorneys' fees and costs would be approximately ten times the amount realized by the single client, and there is no injunctive relief beyond the promotion and backpay. Plaintiff's effort has, however, established (at least for this Circuit) a new concept of employment discrimination which can be of benefit to others similarly situated. The forthcoming decision of the Supreme Court in *City of Riverside v. Rivera*, (*cert. granted*, 106 S.Ct. 244, October 21, 1985) may illuminate this Court's responsibility in the ultimate award of fees where there is such a gross discrepancy between the cost of legal services and the amount realized, but a new legal principle of potential value to others has been established.

Defendants have itemized the elements of the fee and cost reimbursement which may likely be awarded, irrespective of the final outcome of the fee litigation. *See* Exhibit 1 to Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Application for an

Interim Award of Attorneys' Fees and Costs incurred Through February 28, 1986. Defendants contend that these amounts should be further reduced in recognition of the fact that plaintiff has not yet prevailed on some issues. *See Copeland v. Marshall, supra*, 641 F.2d at 891-92. Such adjustments may be appropriate in the final accounting, but is not necessary at this stage, when an interim award substantially smaller than that requested by plaintiff is made pending resolution of plaintiff's remaining claims.

Accordingly, the accompanying order will, pursuant to Fed. R. Civ. P. 54(b), grant judgment to plaintiff on her claim for promotion, backpay, and an award of interim fees and costs because there is no just reason for delay.

/s/ Louis F. Oberdorfer
United States District Judge

Date: June 11, 1986

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-1980

MABEL A. KING,
Plaintiff,

v.

JAMES F. PALMER, *et al.*,
Defendants.

ORDER

For reasons stated in an accompanying Memorandum, it is this 11th day of June, 1986, hereby

ORDERED: that plaintiff's motion for entry of judgment and for other relief should be, and it is hereby, GRANTED IN PART and DENIED IN PART; and it is further

ORDERED, ADJUDGED and DECREED: that judgment should be, and it is hereby, entered for plaintiff in the above entitled action; and it is further

ORDERED: that plaintiff shall, on or before June 20, 1986, submit a proposed order (as described in the accompanying memorandum) effecting promotion of plaintiff to a DS-12 position and awarding backpay, plus prejudgment interest at the rate prescribed by D.C. Code § 28-3302; this proposed order should be endorsed as having been seen by defense counsel; and it is further

DECLARED: that plaintiff is a prevailing party entitled to interim attorneys' fees and costs (*Parker v. Lewis*, 670 F.2d 249 (D.C. Cir. 1982)); and it is further

ORDERED: that defendants shall pay to plaintiff $95,937.76 as interim attorneys' fees and $8,787.58 as interim reimbursement for costs; and it is further

ORDERED: that there will be a status conference on June 26, 1986, at 9:30 A.M. in Courtroom No. 3, U.S. Courthouse, Washington, D.C.; and it is further

ORDERED: that trial of plaintiff's work environment reprisal claims is presently scheduled to commence August 5, 1986, at 10:00 A.M. and continue for two days; the Court will by future order set a pretrial conference date and establish a schedule for the filing of pretrial briefs.

/s/ Louis F. Oberdorfer
United States District Judge

APPENDIX M

Law Offices
ROBERT M. ADLER
The Flour Mill, Suite 103
1000 Potomac Street, N.W.
Washington, D.C. 20007
Telephone (202) 298-8323

March 16, 1983

Mrs. Mabel King
1305 30th Street, S.E.
Washington, D.C. 20020

Dear Mrs. King:

We are writing to confirm our fee arrangements for representing you in connection with your claims under Title VII.

We will be billing you at an hourly rate of $100 for my time, $70 hourly for associate time, and $25 hourly for law clerk time. In addition, we will bill you for out-of-pocket expenses such as xerox, postage, filing fees, deposition costs, messenger service fees, and the like.

We are mindful of your limited ability to pay continuing legal costs on what could be extensive litigation arising from your claims. Thus, we have agreed to accept representation on a modified basis as follows:

1. You will provide us with a retainer in the sum of $1,500. We will apply against this retainer our hourly and expense charges as set forth above. Once this retainer is exhausted, we will bill you on a monthly basis for our continuing time and expense charges. You will be directly responsible for such billings up to the amount of $5,000;

2. Once the $5,000 level has been reached, we will continue charging our hourly rates, and adjust those rates on a basis so that they are current with rates

charged to other clients for similar work. However, we will seek an award of attorneys' fees from the defendants with respect to those amounts, should we be the "prevailing party" (we would also seek a recovery from the defendants of amounts paid by you for legal fees and expenses). However, since there is no assurance that we will become the "prevailing party," this being particularly the case since there are substantial risks involved in your case, there is no assurance that these attorneys' fees and expenses will be recovered. Moreover, since the Court has discretion in this area, there is no assurance as to the amount of any such recovery;

3. Notwithstanding the $5,000 stipulation, as stated above, you will have a continuing responsibility for reimbursement to our firm for all out-of-pocket disbursements. We will bill these disbursements on a monthly basis and expect to be paid within a thirty (30) day period thereafter.

If the above meets with your approval, kindly sign the attached copy of this letter and return it to our office in the envelope provided together with your retainer in the sum of $1,500.

Sincerely,

/s/ Robert M. Adler
ROBERT M. ADLER

RMA/cs
Enclosure

READ AND AGREED TO:

/s/ Mrs. Mabel King
MRS. MABEL KING

Date: 4/10/83

FILED
MAR 26 1992
OFFICE OF THE CLERK

(2)

No. 91-1370

In The

Supreme Court of the United States

OCTOBER TERM, 1991

MABEL A. KING,
Petitioner,

v.

WALTER B. RIDLEY, DIRECTOR,
DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, AND
THE DISTRICT OF COLUMBIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

JOHN PAYTON,
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

DONNA M. MURASKY,
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In The

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1370

MABEL A. KING,
Petitioner,

v.

WALTER B. RIDLEY, DIRECTOR,
DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, AND
THE DISTRICT OF COLUMBIA,
Respondents.[1]

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

ARGUMENT

The District of Columbia agrees that the issue presented by this case — whether risk enhancement is available under the typical fee-shifting statute — should be reviewed by this Court. Indeed, this Court has already agreed to address this issue in *City of Burlington v. Dague*, No. 91-810. In *Dague*, this Court will revisit *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), a decision that has caused the courts of appeals to be hopelessly in conflict over the meaning of fee-shifting provisions in more than 100 federal statutes.

[1] James F. Palmer, who was sued in his official capacity as the Director, District of Columbia Department of Corrections, no longer holds that position. The present Director is Walter B. Ridley. The respondents will be collectively referred to in this brief as the District of Columbia or the District.

There is no reason, however, to review this case with *Dague* simply because this case has a more extensive factual record.[2] The United States Court of Appeals for the District of Columbia Circuit sitting *en banc* has correctly ruled that risk enhancement is not available as a matter of law. As a consequence, the factual submissions on which this petition so heavily relies are irrelevant.

The views of the District of Columbia on the availability of risk enhancement under the typical fee-shifting statute have been presented in an *amicus* brief submitted by the District and several of the States in *Dague*. The *amicus* brief takes the position that Congress has not authorized risk enhancement in such fee-shifting statutes. It also takes the position that, if risk enhancement is available, attorney affidavits of the sort submitted in *Dague* and in this case are not sufficient under *United States Department of Labor v. Triplett*, 494 U.S. 715 (1990), to discharge whatever burden this Court may impose on prevailing plaintiffs to show that risk enhancement is necessary to ensure that they were able to secure counsel. The insufficiency of such evidence is underscored by the fact that here, as in *Dague*, competent counsel agreed to undertake representation on a contingent-fee basis without any assurance of risk enhancement.

Finally, the District notes a significant and telling error in the petition here. The petition claims that the D.C. Circuit erred in setting aside the risk enhancement awarded by the trial court because "[t]he trial court ruled properly on all the evidence before it." Cert. Pet. at 29. The petition also claims that, if this Court should adopt Justice O'Connor's concurring opinion in *Delaware Valley II*, "then the decision of the D.C. Circuit *en banc* should be reversed and the contingency enhancement of 100 percent reinstated." Cert. Pet. at 30.

[2] On March 9, 1992, this Court entered an order denying petitioner's motion to expedite consideration of this case to permit it to be argued with *Dague*.

The trial court, however, did not award a risk enhancement of 100 percent; it awarded a risk enhancement of 50 percent. See Cert. Pet. App. at 75a. Thus, if the petition is correct that the trial court acted properly, counsel for petitioner is entitled to only half of the 100 percent enhancement requested in this Court.

The petition's serious error in understanding what the trial court did highlights one other important point. There is not now a single judge on the D.C. Circuit who supports the across-the-board 100 percent risk enhancement sought in this petition. The dissenters in the *en banc* decision would have affirmed the trial court's risk enhancement of 50 percent; they did not state that this award should be set aside as an abuse of discretion and replaced by a 100 percent enhancement. See Cert. Pet. App. at 28a-50a.

CONCLUSION

This case should be held in abeyance pending disposition of *Dague*. If, as the District has urged, this Court in *Dague* should decide that risk enhancement is not available under the typical fee-shifting statute, the petition for review here should be denied.

Respectfully submitted

JOHN PAYTON,
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

DONNA M. MURASKY,
Assistant Corporation Counsel
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Supreme Court, U.S.
FILED
MAR 31 1992
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(3)

No. 91-1370

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MABEL A. KING,
Petitioner,

v.

WALTER B. RIDLEY, DIRECTOR,
D.C. DEPARTMENT OF CORRECTIONS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONER'S REPLY BRIEF

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(Counsel of Record)
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March 31, 1992

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* The parties to the proceeding below were the Petitioner, Mabel A. King, and the Respondents, James F. Palmer, Director, District of Columbia Department of Corrections, and the District of Columbia. Mr. Ridley has succeeded Mr. Palmer in office.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1370

MABEL A. KING,

Petitioner,

v.

WALTER B. RIDLEY, DIRECTOR,
D.C. DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

ARGUMENT

Respondents concede in their Brief in Opposition that "the issue presented by this case—whether risk enhancement is available under the typical fee-shifting statute—should be reviewed by this court." Opp. at 1. By agreeing with petitioner that the issue presented is important enough to warrant review by this Court, respondents have narrowed the question presented by the Petition to a simple one. That question is whether the Court should review this important issue solely in the context of the record in *City of Burlington v. Dague*, No. 91-810, or also should have the benefit of the far more fully developed factual record available in *King v. Palmer*, No. 91-1370.

1. Respondents argue that the factual submissions in this case are irrelevant because the Court of Appeals in *King* ruled—according to respondents, correctly so—that risk enhancement is not available as a matter of law. Opp. at 2. But this position that the factual context of the case is irrelevant *presupposes* that this Court will affirm the Court of Appeals' decision that risk enhancement is *never* available. If this Court were to conclude otherwise, and to rule that risk enhancement is *sometimes* available under statutes providing for a "reasonable" attorney's fee, then the Court would obviously be required to establish the appropriate standard or standards for such risk enhancement.

Because the statutory standard is one of reasonableness, the legal question presented is a very practical one. Only with a full appreciation for the realities of the marketplace for legal services will the Court be able to set sound and workable standards for risk enhancements that are based on the realities of contingent fee practice. *See* Pet. at 23. The difficulties that the courts have had in handling this issue in the past counsel caution: future rules in this area should be crafted based only on the fullest possible understanding of the marketplace. If the Court decides to find as a matter of law, as it has found in the past and should continue to find, that risk enhancements are available in appropriate circumstances (*i.e.*, when the market requires such an enhancement as part of a reasonable fee), the quality of the factual record will be far from irrelevant. In such an event, the factual context will be a crucial tool for developing workable standards.

2. The respondents also argue in their Opposition (and in their *Amici Curiae* brief filed in *Dague*) that the difference in the quality of the factual records in *Dague* and *King* is indistinguishable for the purpose of deciding

the question presented.[1] The difference in quality of the two records, however, is substantial. The issue of risk enhancement was a peripheral one in *Dague* and, consequently, the record on the issue is relatively thin. The plaintiff in *Dague* submitted only five affidavits on the issue of risk enhancement, two of which came from the attorneys who represented the plaintiff. Respondents themselves have taken the position that the factual record in *Dague* is inadequate.[2] The record in *Dague* is sufficient to justify the decision in that case, but it is far from ideal as a record for review of the important issue presented here.

King offers the Court a rich factual record upon which to decide the issue presented. The question of risk enhancement was a central issue in this litigation. As a result, extensive opinions below are devoted almost exclusively to the risk enhancement issue. Pet. App. 1a-128a. Furthermore, scores of affidavits are found in the record below from many different sources, including: (1) counsel in the underlying case; (2) other lawyers, specifically regarding this case; (3) local Title VII and employment law lawyers; (4) lawyers who practice in other areas of complex federal litigation in the District of Columbia, sometimes on a contingent fee basis; and (5) *pro se* plaintiffs in similar cases, who were turned down in seeking competent counsel on a contingency basis.[3] The affiants represent almost every facet of the

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[1] Opp. at 2; *see Dague*, No. 91-810, Brief of *Amici Curiae*, the District of Columbia and Several of the States, In Support of Reversal at 17.

[2] *See Dague*, No. 91-810, Brief of *Amici Curiae*, the District of Columbia and Several of the States, In Support of Reversal at 21 (submitted by lead counsel for respondents in *King*) ("The Dague affidavits are utterly insufficient . . . .").

[3] All of these affidavits are contained in the Joint Appendix below which was lodged with the Court when the petition for certiorari in *King* was filed on February 21, 1992.

legal practice—large firms, solo practitioners, partners, associates, and public interest practitioners—and a significant part of the District of Columbia bar.

Also significant is the fact that these affidavits specifically and effectively address the two factors made relevant under Justice O'Connor's concurrence in *Delaware Valley II*: (1) "how a particular market compensates for contingency" and (2) whether the individual plaintiff " 'would have faced substantial difficulties in finding counsel in the local or other relevant market.' " *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 733 (1987) (citation omitted). The record provides exactly the type of market-oriented, empirical evidence that Justice O'Connor's test requires to make an accurate determination. All of the evidence in this case is that lawyers who take contingent fee cases in the District of Columbia require at least 100 percent risk enhancement as an inducement to take such cases. *See* Pet. at 7, 11-13 & nn. 10-12.

3. Because of the limited amount of empirical evidence in the record in *Dague*, those submitting briefs in that case have already built their arguments, in large part on sweeping assertions about how the legal services marketplace works—assertions that are entirely unsubstantiated and grossly inaccurate. For example, the Washington Legal Foundation asserts in *Dague* that "there is no shortage of lawyers willing to take their cases on a non-fee-paying basis."[4] The record in *King* refutes this bold generalization with concrete, empirical evidence, by documenting the reluctance on the part of lawyers to take cases on a contingent fee basis and the difficulty experienced by plaintiffs who cannot afford any other arrangement. *See* Pet. at 7-13 & nn. 7-12.

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[4] *Dague*, No. 91-810, Brief of the Washington Legal Foundation and the Allied Education Foundation as *Amici Curiae* in Support of the Petitioner at 17.

The United States, in its *Amicus Curiae* brief in *Dague*, also makes broad generalizations, unsupported by any facts. The brief states without support that "a contingency enhancement over the lodestar is not necessary to enable a plaintiff with a case involving a fair chance of success to obtain competent counsel." [5] As demonstrated in the *King* record, this assertion is not true, at least in the District of Columbia.

Likewise, the petitioner in *Dague* declares as an absolute that "compensation at a reasonable hourly rate for all hours worked will be sufficient to attract competent counsel . . . ." [6] The numerous affidavits submitted in *King*, in which the affiants attest that a reasonable hourly rate which would attract them to a fee-paying client is not sufficient to attract them to a contingent fee client, refute petitioner's assertion. *See* Pet. at 11-13 & nn. 10-12.

Those opposing risk enhancement also attack the reliance of petitioner, in accordance with conventional practice in the attorney's fees field, on affidavits by counsel and other litigating lawyers. Respondents assert flatly that attorney affidavits "are not sufficient . . . to discharge whatever burden this Court may impose on prevailing plaintiffs to show that risk enhancement is necessary to ensure that they were able to secure counsel." Opp. at 2 (citation omitted). Similarly, *amici* in *Dague* maintain that affidavits submitted in risk enhancement cases are based on "hypothetical circumstances long since past" and, therefore, are "never valuable." [7] The affidavits submitted in *King*, however, are not based on hypotheticals: they are based on the actual experience of a cross-section of the Washington legal market.

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[5] *Dague*, No. 91-810, Brief for the United States as *Amicus Curiae* Supporting Petitioner at 17.

[6] *Dague*, No. 91-810, Brief for Petitioner at 18-19.

[7] *Dague*, No. 91-810, Brief of the Washington Legal Foundation and the Allied Educational Foundation as *Amici Curiae* in Support of the Petitioner at 17.

Evidence of the case intake and billing practices of litigating lawyers is absolutely essential to what is "reasonable" in the way of risk enhancement under the many fee-shifting statutes that adopt the reasonableness standard. When the working of the financial services marketplace is at issue, it is logical to look in large part to financial institutions for evidence of their economic behavior. When agricultural markets are at issue, it is sensible to look to farmers for such evidence. There is no reason it should be any different for legal services and lawyers. Trial judges are perfectly capable of assessing the credibility and weight of attorney affidavits in this area, just as they handle a multitude of other types of economic evidence.[8] In truth, what respondents and others resist is the *empirical conclusion* that is dictated by the evidence as to the legal services market, as found by the trial court below and many others across the Nation: that the prospect of significant risk enhancement *is* often necessary as an inducement to lawyers to take on cases on a contingent fee basis. The unrebutted record in this case illustrates this basic economic reality.

The Court should not have to depend on visions—created in a vacuum—of how the legal market works. In deciding the legal issue here presented, the Court should have before it a full and accurate description of the world of contingent fee practice, as is available in the *King* record.

4. The respondents, in their Opposition, ask this Court to dismiss the extensive record compiled in *King* showing the difficulty that plaintiffs have obtaining competent counsel on a contingent fee basis, simply because Mrs. King was able to obtain counsel without a guarantee of

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[8] Perhaps respondents would prefer to place on prevailing plaintiffs the burden of obtaining formal econometric studies of the marketplace for legal services. But the empirical data for such studies would still come largely from lawyers. In addition, there is no reason to go to such lengths and expense. As this Court has held, a "request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

risk enhancement. Opp. at 2. Respondents' argument, however, distorts the facts. Robert Adler, Mrs. King's counsel in the underlying litigation, relied on the possibility that if Mrs. King prevailed, the trial court might award a risk enhancement. In fact, Mr. Adler stated in his affidavit that he would not have accepted the representation without the prospect of a fee enhancement. *See* Pet. at 7.

Furthermore, the record in *King* contains affidavits from many sources other than Mr. Adler that support the petitioner's contention that contingent fee plaintiffs have substantial difficulty obtaining counsel for cases like Mrs. King's. For example, the record contains the affidavits of six Title VII attorneys who stated that they would not have taken Mrs. King's case on a contingent fee basis if she had approached them in 1983. *See* Pet. at 8-10. The record also contains the affidavits of attorneys who will no longer accept contingent fee cases absent the possibility of risk enhancement, and of legal services representatives who attest to the difficulty they have in finding representation for meritorious claims because of the risk of non-payment in contingent fee cases. *See* Pet. at 8, 10-11. Finally, the record also contains the affidavits of a dozen Title VII plaintiffs who were forced to proceed *pro se* because they could not find counsel who would accept their cases on a contingent fee basis. *See* Pet. at 10 & n.9.

5. Finally, the respondents claim to have found a "significant and telling" error in the petition. Opp. at 2. The supposed error lies in the fact that the petition endorses all of the trial court's rulings on the evidence, while also endorsing the D.C. Circuit's panel decision to award a hundred percent enhancement instead of the fifty percent enhancement awarded by the trial court. This accusation of error is undermined by a careful reading of the D.C. Circuit panel decision. Obviously, the petitioner did not agree with the trial court's decision to award only a fifty percent enhancement. However, this

error of the district court in limiting enhancement to fifty percent was one of law, not fact. As explained in the D.C. Circuit panel decision, the trial court misapplied the holding in *Palmer v. Shultz*, 679 F. Supp. 68 (D.D.C. 1988):

> [The trial court's] error, however, was in applying different levels of enhancement to fully and partially contingent cases. . . . Although the *Palmer* court's calculations of attorney's fees are difficult to discern, it appears to us that it actually awarded an enhancement of 100 percent of the *contingent portion* of the fees—precisely the enhancement urged by King—even though the court referred to a fifty percent enhancement for partially contingent cases.

Pet. App. 57a. As demonstrated by the D.C. Circuit panel decision, the trial court's mistake was clearly one of law. Therefore, it is not inconsistent for the petition to endorse the trial court's factual rulings and the D.C. Circuit panel ruling as to the correct interpretation of the holding in *Palmer v. Shultz*. The facts of this case fully support an award of 100 percent risk enhancement.

CONCLUSION

For these reasons a writ of certiorari should issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, and this case should be consolidated with *City of Burlington v. Dague*, No. 91-810, for consideration on the merits.

Respectfully submitted,

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No. 91-1370

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1991

MABEL A. KING,
Petitioner,

v.

JAMES F. PALMER, DIRECTOR,
D.C. DEPARTMENT OF CORRECTIONS, et al.,
Respondents.

OPPOSITION TO MOTION FOR EXPEDITED BRIEFING
ON PETITION FOR CERTIORARI

The District of Columbia, which is for all purposes the respondent in this case, opposes petitioner's belated motion to expedite briefing in this case so that it may be heard with City of Burlington v. Dague, No. 91-810 (cert. granted, January 27, 1992). Dague is now scheduled for argument on April 21, a little over six weeks from now, and there is nothing in the nature of this case, which involves a dispute over attorney's fees, that warrants expedition.

Furthermore, the principal ground offered by petitioner for asking this Court to hear this case, in addition to Dague, is that "the record in this case lays out the contingency enhancement issue in a factual depth and breadth not available in Dague, and thus offers the better vehicle for resolution of the legal question that is presented in both Dague and this case." Motion at 2.

The District disagrees. In its view, the fundamental legal issue before this Court in Dague is whether Congress authorized risk enhancement in the more than 100 fee-shifting statutes it has enacted that allow a reasonable attorney's fee to be awarded to a party who prevails in litigation. This is an issue that this Court may properly resolve by examining the language and structure of the fee-shifting provisions of these statutes, in accordance with its "judicial role . . . to reconcile competing rights that Congress has established and competing interests that it normally takes into account." Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754, 764 n.4 (1989). As matters now stand, fee-shifting is virtually one-way and tilted in favor of plaintiffs; and counsel for plaintiffs who prevail are entitled to recover fees at market rates for all the time they have reasonably expended on the case. The legal issue before this Court in Dague is whether Congress intended to tilt this balance even further in favor of plaintiffs by permitting fees to be awarded because plaintiffs may not or do not prevail, even though the typical fee-shifting provision permits fee awards only to prevailing parties and even though such provisions do not make what are plainly legislative judgments about when any risk enhancement should be awarded, to whom, and how it should be calculated.

The "dozens of affidavits" (King Cert. Pet. at 3) submitted by attorneys in this case are not going to assist this Court in resolving this issue. Except for the evidence such affidavits provide that risk enhancement is not needed to ensure that

persons with meritorious claim are able to secure counsel, they are, as the court below found, anecdotal and self-interested in motivation. King Cert. Pet. App. 15a-16a, citing Department of Labor v. Triplett, 494 U.S. 715 (1990). In those respects, they do not differ from the five submitted in Dague, and although there are more of them, this is hardly significant in view of the fact that there are far more attorneys in Washington, D.C., than there are in Burlington, Vermont.

As a consequence, the District believes that this case should be held in abeyance. If the Court should conclude, after briefing and argument in Dague, that resolution of the legal issue in Dague somehow requires de novo review of the particular facts of King, this Court can grant certiorari and hear this case along with Dague next Term. In this way, the factual record in this case, as well as the legal issues, can be properly briefed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused on this 5th day of March, 1992, a true copy of the foregoing Opposition to Motion for Expedited Briefing on Petition for Certiorari to be "faxed" to Roger E. Warin, Esquire, and to be mailed to him, first-class, postage prepaid, at Steptoe & Johnson, 1330 Connecticut, N.W., Washington, D.C. 20036.

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